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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Note by the Secretariat

The present report, prepared pursuant to Council resolutions 17/4 and 35/7, examines the duty of States to protect against human rights abuses by business enterprises to whom they provide support for trade and investment promotion. It explores how States can incentivize business respect for human rights in this context, including through withdrawal of trade and investment support in situations where businesses fail to meet their corporate responsibility to respect human rights.

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I. Introduction

A. Background, focus and rationale of the report

1. The starting point for the present discussion is the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Since their unanimous endorsement by the Human Rights Council in 2011, the Guiding Principles have become the authoritative global reference for preventing and addressing adverse human rights impacts arising from business-related activity.

2. In an earlier report, the Working Group examined how States — pursuant to pillar I of the Guiding Principles, the State duty to protect — should lead by example as economic actors by ensuring that State-owned enterprises respect human rights (A/HRC/32/45). The present report focuses on another area where States play an important role as economic actors: trade promotion, also referred to as economic or commercial diplomacy.

3. States act as gatekeepers when they provide much needed support to businesses by providing trade finance and advisory services aimed at expanding export opportunities. As gatekeepers, States can use their leverage to promote a race to the top by setting out clearly the expectation that businesses respect human rights as a precondition for receiving government support for export activities. States can also promote responsible imports by restricting the flow of goods in supply chains that involve serious human rights abuses.

4. Why should States focus on human rights and the role of business in relation to human rights in the context of trade and investment promotion? The short answer is that global supply chains in cross-border trade present significant human rights risks and challenges. In the export context, sellers of products in global markets need to ensure that the products they are selling will not cause, contribute or be directly linked to adverse human rights impacts. In the context of imports, a buyer of goods in the global marketplace also needs to ensure that the goods it is purchasing were not produced or manufactured in a way that caused, contributed to or was directly linked to adverse human rights impacts, such as forced labour or human trafficking.

5. While there is a much larger connection between the global trading system and adverse human rights impacts, the present report focuses solely on the role States play as service providers and public financiers, insurers and guarantors to companies seeking support for export/import transactions. The report does not address issues of global trade rules or the role of trade treaties and multilateral trade organizations with respect to adverse business-related human rights impacts.

6. In the present report, the Working Group unpacks Guiding Principle 4, which sets forth the expectation that States should take additional steps to protect against human rights abuses by business enterprises that receive substantial support and services from State agencies including, where appropriate, by requiring human rights due diligence. The commentary to Guiding Principle 4 indicates that if State agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk and may add to the human rights challenges faced by the recipient State.

7. Furthermore, in general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights calls on States to revise relevant tax codes, public procurement contracts and export credits, and other forms of State support, privileges and advantages in the case of human rights violations, thus aligning business incentives with human rights responsibilities. In 2017, the leaders of the Group of 20 also recognized the connection between human rights and trade when they referred to the Guiding Principles in a call for more sustainable supply chains.[1]

[1] See "G20 Leaders' declaration: shaping an interconnected world" (July 2017).

8. For the present report, the Working Group solicited input from all stakeholders, including States, and from the Export Credit Group of the Organization for Economic Cooperation and Development (OECD) and its separate working group of environmental and social practitioners, which includes representatives of non-OECD States as well. Consultations also included an open consultation in Geneva in September 2017 and a dedicated session at the 2017 Forum on Business and Human Rights.[2]

B. Definition and objectives

9. States provide a wide range of services for businesses engaged in trade and export. Those services include selecting companies for participation in trade missions, export promotion and marketing for companies through trade and commercial officers in embassies overseas, advocacy by senior government officials of companies who are bidding on major overseas projects, political risk insurance, guarantees and support at major trade shows. The present report refers to such trade promotion activities by public actors as "commercial" or "economic" diplomacy.

10. There are innovative models being deployed in some States, but the promise of Guiding Principle 4 remains mostly unfulfilled. In the report, the Working Group explores opportunities for States to take the lead and promote greater respect for human rights. As noted in the report, in related areas such as combating corruption and business integrity, models exist in trade and investment promotion that could be adapted to encompass business respect for human rights. While anti-corruption commitments may be linked to State commitments via international treaties (for example, the United Nations Convention against Corruption), the principle is still a useful one: that by embedding a requirement into a contract between trade promotion agencies and companies, if there is a breach of such an agreement, that would be a basis for further action, such as the withdrawal of future trade support or other government services.

11. The first objective of the report is to understand how States can use their leverage with respect to trade and investment promotion and the export/import process to also promote greater corporate respect for human rights. The second objective is to explore where, pursuant to the State duty to protect against business-related human rights impacts, there are opportunities for States to require businesses with whom they interact, to align their activities with the Guiding Principles through the requirements of human rights due diligence and addressing issues relating to access to effective remedy.

II. Trade and export promotion

A. Respect for human rights as a requirement and condition of State support

12. Many States provide ongoing advisory services for companies seeking to export their goods into foreign markets. Such services often reach small and medium-sized enterprises, which may lack the in-house expertise and financial resources for individual market research. To date, few States have asked businesses to demonstrate a commitment to the Guiding Principles as a prerequisite for receiving services from State export promotion entities. For those who have asked for human rights commitments, there have been no studies to examine how well such commitments are monitored and implemented by States.

13. Canada has asked for specific commitments from the extractive sector. As part of the country's enhanced corporate social responsibility strategy, Canadian extractive companies are expected to align their operations overseas with Canadian corporate social responsibility guidelines and will be eligible for enhanced economic diplomacy only after

[2] The following States responded to the Working Group's survey: Costa Rica, Denmark, Finland, France, Germany, Italy, Mexico, Mongolia, Namibia, Netherlands, Philippines, Portugal, Russian Federation and United States of America.

doing so. Those commitments include adherence to the Guiding Principles and to the OECD Guidelines for Multinational Enterprises.

14. Chile notes in its National Action Plan on business and human rights that it intends to establish, if relevant, requirements about sustainability and respect for human rights, as criteria to choose business enterprises to participate in programmes to promote exports and corporate activities.[3] The Ministry of Commerce, Industry and Tourism in Colombia intends to link access to trade and investment support to business commitments to respect human rights.[4] The Danish Ministry of Foreign Affairs requires Danish companies with which it interacts to comply with a code of conduct. That includes requirements not to practise discrimination, not to use child labour and to recognize workers' rights.[5]

15. The South African Department of Trade and Industry has developed guidelines for good business practice by South African companies operating in the rest of Africa, setting out the expectation that companies will respect human rights and adhere to the principles of the United Nations Global Compact.[6] While the guidelines are voluntary, they demonstrate how a State can tie responsible business conduct to an export promotion and trade agenda.

16. Asking companies to demonstrate a commitment to ethical standards is not new. States have often required businesses to make anti-corruption pledges as a condition of trade-related support. As part of the 2017 G20 process, the Business-20 (B20) issued a policy paper on responsible business conduct and combating corruption, noting that: "An adequate and robust compliance program should also be a requirement for officially supported export credits and trade insurances."[7]

17. For example, the Kenya Export Promotion Council has an anti-corruption policy which includes enhanced due diligence of its potential local export partners.[8] Austrade, Australia's trade promotion service requires companies to certify ethical business practices as part of their terms of service: "Your organization must be committed to maintaining business ethics and legal obligations including anti-bribery laws in Australia and overseas."[9] Such processes could be expanded to require applicants to also demonstrate commitments to the Guiding Principles and the OECD Guidelines alongside an anti-bribery or business ethics pledge.

B. Trade missions

18. Trade missions are an important tool in export promotion and commercial diplomacy. They allow potential exporters to learn how business is conducted in a foreign market and to find potential overseas buyers. They are often facilitated by a State export promotion agency or department and/or with the assistance of trade or commercial officers located in embassies in the country that the delegation will visit. High-level government officials may also head a trade mission delegation.

19. The Council of Europe recommendation on human rights and business discusses trade missions. It notes that "Member States should, when business enterprises ... are represented in a trade mission to member States and third countries, address and discuss

[3] See www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

[4] See "National Action Plan on human rights and business", available at www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

[5] Danish submission in response to the call for stakeholder inputs.

[6] See, for example, www.rmi.org.za/guidelines-for-good-business-practice-by-south-african-companies-operating-in-the-rest-of-africa/.

[7] See B20 Cross-thematic Group on Business Conduct and Anti-corruption, "Promoting integrity by creating opportunities for responsible businesses".

[8] Kenya Export Promotion Council, "Revised anti-corruption policy" (2011).

[9] See www.austrade.gov.au/Australian/How-Austrade-can-help/Trade-services/Opportunties-terms-and-conditions.

possible adverse effects future operations might have on the human rights situation in those countries and require participating companies to respect the UN Guiding Principles ...".[10]

20. Only a handful of States have sought to integrate human rights issues into official trade missions. The United Kingdom of Great Britain and Northern Ireland did so in relation to Myanmar. Finland involved human rights civil society organizations in a joint trade mission led by its trade and development ministers to the United Republic of Tanzania and Zambia.[11] In its recent National Action Plan, Ireland committed to advising companies who will participate in trade missions about human rights in destination countries and providing information about its laws prohibiting foreign bribery.[12] Belgium will also ensure that the trade missions it organizes include awareness-raising regarding respect for human rights.[13]

21. The Netherlands now has a routine requirement for all trade missions to brief businesses on human rights issues. It takes one more step in selecting mission participants. Dutch companies that wish to participate in government-sponsored trade missions must demonstrate a commitment to the OECD Guidelines for Multinational Enterprises, with an emphasis on human rights risk analysis. The Government verifies to what extent the business is aware of the Guidelines and, shortly before departing on a trade mission, the business is provided with training on standards of responsible business conduct.[14]

22. Trade missions provide unique opportunities for States to raise awareness of business and human rights dilemmas related to the market they are visiting.[15] For example, in countries where attacks on human rights defenders are a significant risk, that should be raised in the context of trade missions. Civil society organizations have suggested to the Working Group that this may be a particularly useful avenue for addressing the risks faced by defenders when there is a link to businesses receiving trade or investment support from their home Government.[16]

23. States already vet companies that participate in foreign trade missions to ensure they meet certain criteria. The United States of America, for example, screens applicants for trade mission for bribery concerns and also asks them to sign a no-bribery pledge as a precondition to participation.[17] States should consider developing similar procedures whereby companies are asked to demonstrate a commitment to the Guiding Principles and responsible business conduct as a precondition to participation in a mission. The Dutch example appears to be the only model that uses vetting for human rights as a precondition for mission selection.

C. Trade advocacy

24. Trade advocacy support is characterized as those activities for which embassy personnel and high-ranking government officials will advocate on behalf of domestic companies with foreign public officials. The purpose of such advocacy is to highlight the strengths of a national company when it is competing against companies from other countries for a government contract in a foreign market.

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[10] Council of Europe, "Human rights and business" (recommendation CM/Rec(2016)3 of the Council of Ministers).

[11] Institute for Human Rights and Business, "State of play. Human rights in the political economy of States: avenues for application" (March 2014).

[12] See "National Plan on business and human rights 2017–2020", available from https://globalnaps.org/country/ireland/.

[13] Belgian National Action Plan available from https://globalnaps.org/country/belgium./

[14] OECD, "Responsible business conduct and economic diplomacy tools" (June 2017).

[15] Institute for Human Rights and Business, "State of play".

[16] See consultation summary note on scaling up initiatives to protect human rights defenders, (November 2017), available from www.ohchr.org/Documents/Issues/Business/ScalingUpInitiativesProtectHRDefenders_30Nov2017.pdf.

[17] See, for example, United States Government Publishing Office conditions for trade missions, available from www.gpo.gov/fdsys/granule/FR-2017-08-01/2017-16082.

25. Having a senior minister advocate for a company is a substantial benefit. States should only advocate for companies that respect human rights and screen requests to make that determination.

26. The Working Group has not received any information about States requiring companies for whom they advocate to demonstrate respect for human rights or further adoption of the Guiding Principles. As noted above, what some States have done is to require companies to make commitments focused on integrity and combating corruption.

27. In Canada trade advocacy may include providing support to a company in interactions with foreign public officials and in certain circumstances in the public sphere generally. This may also include making representations on behalf of the company to foreign public officials, accompanying clients to meetings with foreign public officials, or supporting and/or participating in, events tailored to a particular company. The Government of Canada requires companies seeking such support from its Trade Commissioner Service to sign an integrity declaration. A company must attest that it understands the ethical expectations of Canada and has not been "charged, convicted or sanctioned for bribery or corruption, and will not engage in such illegal activities".[18] If a company has been sanctioned for bribery, it must disclose past misconduct, which may affect the support it receives from the Government of Canada.

28. The United States International Trade Administration also has an advocacy centre. A company interested in receiving United States advocacy assistance must first file an advocacy questionnaire and anti-bribery agreement with the advocacy centre. The anti-bribery agreement requires a company to certify that neither the company nor its affiliates will engage in bribery of foreign officials.[19]

D. Training and guidance for trade and embassy personnel and for businesses

29. OECD has noted in relation to the promotion of responsible business conduct that "for some countries, the NAPs have provided an impetus to step up specific training and capacity building of diplomatic personnel".[20]

30. There is still room for greater training and education of trade officers within national export promotion agencies and of those officials working within embassies or missions in host States.[21] However, at present this need is not matched by relevant guidance.

31. Existing guidance (for example from the International Trade Centre) mentions the need to train trade representatives on issues relating to combating corruption and fleetingly mentions social compliance and corporate social responsibility as other issues of which trade representatives should be aware, but does not elaborate further on the subject. A trade promotion officer may not feel comfortable providing guidance to companies on human rights risks. The language of risk mitigation in the Guiding Principles and the framework of human rights due diligence therefore provide a useful framework for speaking about the processes companies need to undertake to respect human rights.

32. Germany intends to provide training on its National Action Plan and the Guiding Principles for trade officers in embassies and consulates. The training will enable trade officers to provide support to German companies that wish to exercise human rights due diligence in the respective host countries. Staff members of German export and investment

[18] See http://tradecommissioner.gc.ca/how-tcs-can-help-comment-sdc-peut-aider.aspx?lang=eng.

[19] See https://2016.export.gov/advocacy/eg_main_092202.asp.

[20] See OECD, "Responsible business conduct and economic diplomacy tools".

[21] International Trade Centre, *Entering New Markets. A Guide for Foreign Trade Representatives* (2013).

guarantee agencies are offered classroom training on the Plan and environmental and social specialists act as a helpdesk.[22]

33. In addition to training trade officials, some States are providing tools for their officials as well as for companies.

34. The Belgian National Action Plan briefly mentions that diplomats do not always have the necessary tools or knowledge of human rights and business in particular, to inform and guide companies to ensure that their extraterritorial activities take account of their impact on human rights. As a result, Belgian trade representatives will receive a toolbox to better inform companies that seek to export. The toolbox will include elements on grievance mechanisms enabling the Belgian diplomatic network to better inform businesses and victims of possible business-related abuses about access to remedy in Belgium. The United Kingdom has developed a government business and human rights toolkit, which aims to give guidance to political, economic, commercial and development officers in embassies as to how to promote responsible business conduct by British companies operating overseas.[23]

35. Some training for companies is done via partnerships between States. Sweden has entered into memorandums of understanding with certain countries on corporate social responsibility. For example, there are two memorandums between China and Sweden, including an action plan establishing a centre for corporate social responsibility at the Swedish Embassy in Beijing. Among other activities, the centre provides training for companies.[24] Chile and Sweden signed a memorandum of understanding on corporate social responsibility in 2012. India and China have a partnership agreement to promote trade and investment, which includes a commitment to fostering stronger cooperation between national chambers of commerce and encourages companies in both States to include corporate social responsibility in their corporate development strategies.[25]

36. China has also focused on providing sectoral guidance to its companies. The 2014 guidelines for social responsibility in outbound mining investment produced by the China Chamber of Commerce of Metals, Minerals and Chemical Importers and Exporters call for Chinese mining companies undertaking outbound mining investments, cooperation and trade to strictly observe the Guiding Principles during the entire life-cycle of the mining project and to strengthen responsibility throughout the extractive industries value chain.

37. The increasing number of States that are including training and educational resources on corporate social responsibility and on business and human rights for both trade and embassy personnel and companies operating or trading abroad is a positive step. Training and counselling help to raise awareness of key human rights issues in the private sector. States need to consider how to move such training beyond theory into actual practice. To that extent, training needs to include discussions of real-world dilemmas that occur to enable trade officers to start thinking critically about the advisory role they play with companies. At the same time, training and education is at most a partial step towards States fulfilling their duty under Guiding Principle 4. Few States link providing trade promotion services or benefits, such as participation in a trade mission, to requiring businesses to demonstrate respect for human rights and use of the Guiding Principles.

III. Role of export credit agencies

38. Export credit is a tool used by Governments to provide trade finance to the private sector. Under an export credit regime, States provide loans and other types of risk cover (for example, insurance) for a domestic exporter's international buyers. Providing financing

[22] National Action Plan. Implementation of the UN Guiding Principles on Business and Human Rights 2016–2020, available from https://globalnaps.org/country/germany/.

[23] See OECD, "Responsible business conduct and economic diplomacy tools".

[24] See, for example, http://csr2.mofcom.gov.cn/article/media/201709/20170902652354.shtml.

[25] See Five-Year Development Program for Economic and Trade Cooperation between the People's Republic of China and the Republic of India (September 2014).

to potential buyers offers an incentive to foreign buyers to choose an exporter. Insurance and guarantees reduce the risk to the domestic exporter of non-payment by the overseas buyer.

39. In practical terms, export credit agencies provide three main instruments to support domestic exporters (a) insurance, (b) short-, medium- and long-term export credits and (c) guarantees, often coupled with advisory services (market information).[26]

40. There are various models of export credit agency including:

(a) Those which are State agencies or departments;

(b) Government-owned State corporations that are operated independently but have government oversight;

(c) Consortiums of public/private companies that may be controlled by a Government through funding or regulation.[27]

41. Export credit agencies fulfil the basic financial needs of exporters, including pre-export working capital to short-term credit extended to importers; medium- to long-term financing support to overseas importers; and project financing and/or special export structures. Although their share of the overall financing of global trade remains small, they play an increasingly important role.[28] In 2015 alone, export credit agencies in OECD member nations provided $125 billion in credit, insurance, guarantees and interest support.[29] In the period 2012–2016, public export and investment insurance via export credit agencies totalled between $920 billion and $1.031 trillion.[30] They are also a significant source of public financial support for infrastructure projects in developing countries. While their mandate and objectives are commercial, they may produce positive impacts in developing countries, such as the creation of more and better jobs, or the provision of capital and climate finance in or to developing countries.[31]

42. Although export credit agencies support domestic exporters, they do so typically by providing financing for a project sponsor who is purchasing goods as part of a larger infrastructure project or supply chain. A significant number of the projects supported by export credit agencies, particularly large dams, oil pipelines, coal and nuclear power plants, chemical facilities, mining projects and forestry and plantation projects, may lead to adverse human rights impacts (A/66/271). Projects by export credit agencies have been associated with the forced displacement of local populations, poor conditions of work, suppression of the rights to freedom of expression and association and exposure to environmental complaints, as well as the destruction of cultural sites.[32] Export credit agencies have also been scrutinized by civil society for more systemic issues, such as the nature of the projects and industries they finance (for example, the arms trade) or their linkage to sovereign debt in developing countries.[33]

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[26] See Edna Shöne, Sustainable ECA business — an irreversible global trend, *Global Policy Journal* blog (February 2015).

[27] See Karyn Keenan, "Export credit agencies and the international law of human rights", Halifax Initiative (2008). Although export credit agencies take various organizational forms, they are usually backed by a Government and operate in accordance with a government mandate.

[28] Both Ends, "Balancing risks: what export credit agencies can do for sustainable development" (January 2007).

[29] See https://globalnaps.org/issue/export-credit/.

[30] Berne Union aggregate statistics, 2016 year end, available from www.berneunion.org/DataReports.

[31] See Trinomics, "Pilot study of private finance mobilised by Denmark for climate action in developing countries" (2015).

[32] See Jubilee Australia, "Risky business. Shining a light on Australia's export credit agency" (December 2009), ECA Watch, "Race to the bottom, take II" (September 2003), and Robert McCorquodale and Penelope Simons, "Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law", *Modern Law Review*, vol. 70, No. 4 (July 2007).

[33] See European Network against Arms Trade, "European export credit agencies and the financing of arms trade" (2007) and European Network on Debt and Development, "Exporting goods or exporting debts? Export credit agencies and the roots of developing country debt" (December 2011).

43. Civil society groups have raised and continue to raise concerns about specific projects financed by export credit agencies.[34] The case of the Ilisu dam is often cited as an example of a project which has had significant human rights impacts, such as population resettlement and the destruction of cultural heritage. In 2005, a consortium applied for export credit guarantees in Austria, Germany and Switzerland for the construction of a hydroelectric dam. The respective export credit agencies offered their support based on 153 environmental and social commitments but the Governments of Austria, Germany and Switzerland ultimately withdrew funding for the dam project. That followed independent expert assessments, which concluded that the dam project was not meeting the agreed standards, including in relation to social and environmental impacts. The lesson drawn from the Ilisu project was that export credit agencies needed to put in place due diligence processes and project monitoring.[35] More recently, in at least one instance, a national contact point has noted that an agency may not have fully used its leverage or engaged in the proper level of human rights due diligence as required under the OECD Guidelines.[36]

44. Other human rights impacts that arise outside of a traditional project finance context may relate to the nature of goods being exported in a global supply chain. For example, in information and communications technology an exporter may sell goods to a customer (State or non-State) that will use the equipment for surveillance, leading to adverse impacts on a person's right to life, to arbitrary detention, torture and potential violations of other civil and political rights.[37]

45. Given the connection between export credits and finance linked to adverse human rights impacts, are there requirements in place that businesses who receive support in the form of export credit respect human rights, conduct due diligence and align their operations with the Guiding Principles? The answer is mixed, with only a subset of public or publicly supervised/funded export credit agencies currently requiring some form of human rights due diligence, and then only for a subset of transactions, typically with a term of two years or longer.

46. One of the largest gaps in terms of export credit and alignment with the Guiding Principles is that many public export credit agencies have no explicit focus on human rights due diligence as part of their operations, either for their own decision-making or as a requirement for their clients.

47. The largest export credit membership organization is the Berne Union, which is a network of private and public entities. Its 85 members include government-backed export credit agencies, private credit and political risk insurers and multilateral institutions which provide insurance products, guarantees and, in some cases, direct financing in support of cross-border trade.[38] The insurance products its members provide offer protection for exporting companies, investors and financial institutions against losses as a result of buyer default.

48. At present, the Berne Union has no explicit mandate to address human rights or social impacts as part of its activities, although its operating principles do refer to

[34] See Export Credit Watch list of reports focusing on human rights concerns surrounding projects financed by public export credit agencies, available from www.eca-watch.org/ecas/export-credit-agencies; Amnesty International, "A history of neglect: UK export finance and human rights" (June 2013); Halifax Initiative and others, "Export credit agencies and human rights: failure to protect" (2015).

[35] See Michael M. Cernea, "Population displacement and export credit", Brookings Institution (December 2011). See also Christine Eberlein and others, "The Ilisu dam in Turkey and the role of export credit agencies and NGO networks", *Water Alternatives*, vol. 3, No. 2 (June 2010).

[36] See www.oecdguidelines.nl/latest/news/2016/11/30/final-statement-both-ends-associacao-forum-suape-vs-atradius-dutch-state-business.

[37] Institute for Human Rights and Business, "Telecommunications and human rights: an export credit perspective" (February 2017).

[38] See www.berneunion.org/Members.

sustainable growth, respect for the environment and operation with high ethical values.[39] Within the Union, there is a committee of export credit agencies from emerging markets known as the Prague Club Committee. The majority of members are from smaller markets in Eastern and Central Europe, the Middle East, Central Asia and Africa.

49. In 2012, the United States and China agreed to discuss a set of new global guidelines on export credits through a new international working group on export credits. The International Working Group is led by China, Brazil, the United States and the European Union as rotating chairs. It currently has 18 participants, including South Africa and the Russian Federation. India is an observer in the process.[40] Neither environmental nor social impacts of export credit agency activities are currently on the agenda of the Working Group.

50. Brazil, China, India, the Russian Federation and South Africa currently meet to discuss export credit policies in the BRICS Forum.[41] The principles of the Forum include a commitment to supporting sustainable development, strong, balanced and inclusive growth, financial stability, and a balanced combination of measures ensuring social and economic development and protection of the environment, providing an opening for a discussion of human rights. At present, the priority areas of cooperation do not include social risks or human rights.

51. OECD is currently the main organization that has incorporated human rights into export credit decision-making. The OECD Working Party on Export Credits and Credit Guarantees (Export Credit Group) was established in 1963 to carry forward the work of OECD on export credits, including working out common guiding principles, such as on environmental and social issues. OECD has developed recommendations for export credit agencies with respect to environmental and social due diligence, which are intended to guide the work of the official export credit agencies of member States.

52. The Export Credit Group currently has 33 Members. Chile and Iceland do not participate in the work of the Group as they do not have official support programmes in place. Non-members such as Brazil, Romania and the Russian Federation regularly attend Group events as invitees.[42] There is a separate export credit arrangement, whereby a group of OECD member and non-member States meet to develop common practices focusing on price and terms of credit to ensure a level playing field.[43]

53. The Export Credits Group has negotiated several successive OECD instruments (the Common Approaches) designed to provide a framework for export credit agencies when addressing the potential environmental and social impacts of projects. The two most relevant documents are the 2012 and 2016 revisions of the Common Approaches.[44] In undertaking work on environmental and social issues, the Group has been assisted, since 2004, by its practitioners' group, consisting of the environmental and/or social experts from export credit agencies who are responsible for undertaking due diligence and monitoring of projects. The practitioners meet separately from the Export Credits Group several times a year to discuss implementation of the Common Approaches.

54. The 2012 recommendation was the first instrument to mention human rights reflecting the adoption of the Guiding Principles, which were referenced in its preamble, asserting that "social impacts" encompassed relevant adverse project-related human rights impacts and that such impacts included forced labour, child labour and life-threatening

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[39] See Berne Union value statement, available at www.sid.si/sites/www.sid.si/files/documents/splosni-dokumenti/berne_union_value_statement_2004.pdf. Berne Union members discuss environmental and social issues but have no publicly available guidelines or programmes.

[40] See http://capexil.org/background-note-iwg-on-export-credit/.

[41] See brics.itamaraty.gov.br/images/pdf/BRICSMOU.doc

[42] Information provided by the OECD Export Credit Group secretariat.

[43] The Participants Group is not an OECD body and does not, therefore report to the OECD Council, however it meets under the auspices of OECD with support from the OECD export credits secretariat.

[44] See OECD Council recommendation on common approaches for officially supported export credits and environmental and social due diligence, adopted by the Council in June 2012 and the revision adopted in April 2016.

occupational health and safety situations. In the 2012 recommendation members were asked to consider the issue of human rights, with the aim of reviewing how project-related human rights impacts might be further addressed in future. There were, however, no specific recommendations on human rights due diligence.

55. In 2016, the OECD Council approved a revised version of the Common Approaches. In that document, there is an explicit statement to the effect that export credit agencies should now screen all applications covered by the Common Approaches, according to whether or not there might be a strong likelihood of severe project-related human rights impacts occurring.[45] Participating export credit agencies should then assess the potential environmental and/or social risks in applications relating to all existing operations for which their share is equal to or above SDR 10 million and all existing operations and projects, irrespective of their share, where screening has identified a strong likelihood of severe project-related human rights impacts occurring.

56. In screening an application, export credit agencies will then place the project into category A, B or C, which imply a requirement for varying levels of environmental and social review, including environmental and social impact assessments. In addition, where screening has identified a strong likelihood of severe project-related human rights impacts occurring, the environmental and social review of a project may need to be complemented by specific human rights due diligence.

57. A footnote to the 2016 recommendation provides examples of severe project-related impacts. For example, impacts that are particularly grave in nature (threats to life, child or forced labour and human trafficking), widespread in scope (large-scale resettlement and working conditions across a sector), cannot be remediated (torture, loss of health and destruction of the land of indigenous peoples) or are related to the operating context of the project in question (conflict and post-conflict situations).

58. Specific methods for human rights due diligence are left to the discretion of individual export credit agencies. Moreover, the due diligence approach described above is only applicable to applications covered by the Common Approaches and therefore excludes transactions, such as short-term credit under two years, working capital, support for bonds and transactions that may be considered outside the current definition of "project", such as mobile equipment (for example, ships) and communications equipment. The 2016 recommendation allows for projects backed by an export credit agency to be benchmarked against the World Bank environmental and social safeguard policies or the International Finance Corporation (IFC) Environmental and Social Performance Standards, depending on the financial structure of the transactions. Some export credit agencies have decided to benchmark all projects against the IFC Performance Standards, but again practice is variable.

59. For export credit agencies, the OECD Guidelines should also serve as a key tool alongside the Guiding Principles. The Guidelines state that the ownership structure of a multinational enterprise (whether public or private) does not change their applicability. The Guidelines, which incorporate a human rights chapter aligned with the Guiding Principles, require export credit agencies, which are business entities themselves, to engage in appropriate human rights due diligence with respect to their business relationships and to the extent that they are representatives of the State or public entities, to use their leverage to require their business partners and clients to do the same.

60. A recent decision by the Dutch National Contact Point clarifies the status of export credit agencies. In June 2015, the national contact point system received a complaint alleging that Dutch export credit agency, Atradius DSB had failed to comply with the OECD Guidelines in the context of its financing of a dredging project in north-eastern Brazil, which had resulted in severe human rights and environmental impacts. The complaint against Atradius stated that it had failed to ensure that the Guiding Principles and the IFC Performance Standards had been effectively applied to the project. In its initial assessment, accepting the complaint of 3 December 2015, the Dutch National Contact Point

[45] Para. 6.

found that Atradius qualified as a multinational enterprise under the Guidelines and concluded that the specific instance merited further consideration.[46]

A. Examples of good practices among export credit agencies

61. The environmental and social practitioners group associated with the OECD Export Credit Group include representatives of countries which are not OECD members, such as Brazil, Kazakhstan, the Russian Federation and others. The fact that a wide range of publicly-backed export credit agencies from both member and non-member OECD countries take part in the meetings of the group is a positive step in terms of peer learning and development of good practice. It appears, however that even within the OECD group, export credit agencies are still in the early phases of developing good practice. It is important for them to share their good practices more widely, as evolving public expectations continue to shine a spotlight on the critical role they play in the business and human rights arena.[47]

62. The Norwegian Export Credit Guarantee Agency was one of the first to incorporate human rights due diligence into their screening procedures. The Agency indicates that its environmental and human rights due diligence procedure is based on the OECD Common Approaches and the Guiding Principles.[48] Although the Agency uses the IFC Performance Standards, it states that in order to address any potential gaps in practice, its due diligence process will take into consideration all internationally recognized human rights in a manner that is consistent with the Guiding Principles.[49] The Agency is also unique in describing how it understands and intends to use its leverage to advance respect for human rights in its clients' operations.

63. In the Netherlands, Atradius goes beyond the Common Approaches in conducting human rights due diligence if there is a risk of severe human rights impacts in smaller or shorter-term transactions. It recognizes that the most severe risks to stakeholders may occur in any transaction, unrelated to the duration of cover, the amount of a transaction, or the fact that the policy covers a mobile asset. Atradius was also the first export credit agency to make public a gap analysis, in which it examined its policies and procedures against the Guiding Principles.

64. The Swedish export credit system has developed specific policies and portals that address human rights impacts in the telecommunications sector and make reference to freedom online in documents providing them with annual appropriations.[50] Swedish policies regarding telecommunications provide an interesting model because they focus on a series of impacts that may not be captured by the IFC Performance Standards, which focus on large-scale projects. The development of sector specific guidance is a welcome addition to the export credit area.

65. Even within the OECD Export Credit Group, good practice is still emerging. As a point of comparison, a number of export credit agencies require companies seeking export finance support to make anti-bribery commitments. This includes non-OECD agencies that are parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and have taken this step to implement the relevant recommendation.

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[46] Relevant documents are available from https://www.oecdwatch.org/cases/Case_365.

[47] See Chair of the OECD working party on responsible business conduct, Roel Nieuwenkamp, on the role of export credit agencies, available from www.permanentrepresentations.nl/latest/news/2015/01/12/blog---evolving-expectations-the-role-of-export-credit-agencies-in-promoting-and-exemplifying-responsible-business-practices.

[48] Environmental and human rights policy, available from www.giek.no/responsible-business-conduct/sustainability-article1796-1075.html.

[49] Ibid.

[50] Institute for Human Rights and Business, "Telecommunications and human rights: an export credit perspective".

66. According to an OECD study, 44 export credit agencies require exporters and/or applicants to provide an undertaking/declaration that neither they nor anyone acting on their behalf, such as agents, have been engaged in or will engage in bribery in the course of the transaction. They include the Russian Federation, which exceeds standard expectations by using multiple channels of communication regarding the requirement for an anti-bribery undertaking/declaration. The Russian export credit agency obtains an undertaking/declaration through both the application forms and stand-alone documents. Brazil similarly uses stand-alone documents submitted by the exporter or applicant.

B. Gaps in the OECD Common Approaches

67. As noted above, a large number of non-OECD States do coordinate on export credit policies but have yet to do so on social issues and human rights. Thus the 2016 recommendation on Common Approaches is currently the key document, which sets out good practice for export credit agencies. As noted above, some non-OECD States take part in meetings of the environmental and social practitioners, with an eye to aligning their processes with the Common Approaches.

68. As the Common Approaches only apply to exports for medium- and long-term export credits with a repayment term of two years or more, a variety of export credit financing, insurance and guarantees provided by export credit agencies are not subject to their application. As noted above, there are examples of export credit agencies applying the Common Approaches and hence human rights due diligence across all their product lines, as in the case of the Dutch, but this is still an exception. A key issue is therefore how to extend the role of human rights due diligence across a broader spectrum of products and services.

69. A second issue is which criteria are applied when human rights due diligence is conducted. The Common Approaches default to the IFC Performance Standards, which are not identical to the Guiding Principles. Again, as noted above, some export credit agencies have supplemented their due diligence processes when they needed to address other human rights scenarios, as was the case with Sweden in the telecommunications sector.

70. The Dutch National Contact Point indicated that for Atradius there needed to be a clearer explanation of the gaps in alignment between the Guiding Principles and the Common Approaches. For example, the scope of human rights due diligence is not limited under the Guiding Principles, whereas the Common Approaches apply only to transactions longer than two years.[51]

71. Another area where improvement is needed relates to the transparency of decision-making at export credit agencies. Civil society groups have been critical of them because they do not share the results of their screening with civil society, affected communities and other stakeholders. A recent study of seven Central and Eastern European export credit agencies, also pointed out that greater transparency was needed.[52]

72. The Common Approaches address the disclosure of information. They include recommendations for public information disclosure as follows: (a) limited project information, including environmental and social impact information, in the case of category A projects, to be made available as early as possible in the review process and at least 30 calendar days before a final commitment to grant official support and (b) environmental

[51] See Both Ends, "Gaps between the Common Approaches and the OECD Guidelines" (June 2016) and CORE Coalition and Amnesty International UK joint submission to the United Nations Working Group on Business and Human Rights.

[52] Finance and Trade Watch and CEE Bankwatch Network "*ECAs Go to Market. A Critical Review of Transparency and Sustainability at Seven Export Credit Agencies in Central and Eastern Europe*" (December 2017).

and social information on projects classified in categories A and B at least annually after a final commitment to provide support.[53]

73. In exceptional cases, the Common Approaches allow for the information for category A projects, referred to in paragraph 71, not to be disclosed. In those cases, export credit agencies are only required to report to the OECD Export Credit Group. As category A and B projects cover only a small part of the total portfolio of projects supported by export credit agencies, civil society groups have criticized the Common Approaches for lack of transparency across product lines.

74. Based on the mediation which took place between Atradius and two civil society groups before the Dutch national Contact Point, Atradius agreed to change its information disclosure policy in order to be more transparent, as required under the Guiding Principles. The final statement of the National Contact Point indicates that Atradius and the Ministry of Finance agreed to develop a more specific information disclosure policy that starts from the assumption that relevant information should be public, unless specific clearly defined considerations bar such disclosure (as in the case of confidential business information). Atradius agreed to improve the ex-post publication of information on all project categories (A, B, C, M and E), for example by disclosing the nature of the product for each relevant transaction. For category A projects, including transactions with a repayment period of less than two years, an adequate summary of the transaction and the framework of the assessment will be published.[54]

75. Because of the national contact point decision, Atradius took the step of crafting a new environmental and social policy, effective in 2018, that will presumably, among other changes, make more information public, with limited exceptions. It asked Shift, a non-profit organization, to review its prior policies and procedures. The review explored the extent of the alignment of its policies and processes with the Guiding Principles and what changes would be needed to create greater alignment. The report done by Shift recognizes that Atradius goes beyond some of those requirements in practice, but that the Guiding Principles expect even more when it comes to transparency. The authors found that the environmental and social policy framework of Atradius did not articulate a broad approach that recognized the potential value to the business that greater transparency and communication could play. As a result, public disclosure was positioned more as a burden, where the company must meet very narrow and specific requirements, rather than as an opportunity.[55]

C. Moving beyond the OECD export credit agencies

76. A larger issue is whether other forums can provide platforms for discussion of State responsibilities with respect to environmental and social considerations, including human rights. The OECD Common Approaches are evidence of the value of multilateral harmonization to avoid a race-to-the-bottom approach to human rights and business. However, while the Common Approaches are an important precedent, export financing is no longer an activity carried out exclusively by OECD member States. As of 2013, 44 per cent of global official export support came from export credit agencies outside OECD, including Brazil, China, India and the Russian Federation. As a result, the BRICS Forum could play an important role in aligning State duties under pillar I of the Guiding Principles in the area of export credit. The Berne Union could provide another vehicle for such dialogues, as could the International Working Group on Export Credits.

77. The European Union is yet another forum where export credit agencies could better align their practices with the Guiding Principles. The European Union export credit agency regulation refers to the obligation of member States to comply with the Union's general

[53] See OECD Council recommendation on common approaches for officially supported export credits and environmental and social due diligence (2016), section VII.

[54] See final statement notification Both ENDS- Fórum Suape vs Atradius DSB (30 November 2016).

[55] See Shift, "Integrating human rights due diligence: a review of Atradius DSB's environmental and social policy and procedure".

provisions on external action, such as consolidating democracy and respect for human rights, when establishing, developing and implementing their national export credit systems and when carrying out their supervision of officially supported export credit activities.[56]

D. Export credit agencies and access to remedy

78. Current National Action Plans do not include discussions of the ways in which export credit agencies address and enable access to remedy by rights holders who are harmed in connection with a project or transaction funded or supported by an export credit agency. As a result, civil society groups have recommended that export credit agencies make it easier for rights holders to know about and access relevant complaint mechanisms.[57] There are several possible options. One would be to have a grievance or complaint mechanism at the export credit agency itself and a second would be to require clients who receive export credit to have an effective grievance mechanism, as outlined in Guiding Principle 31. Finally, export credit agencies should use their screening, assessment, support and leverage roles to strengthen their client-level mechanisms and outcomes for people.

79. In 2011, the Global Alliance of National Human Rights Institutions submitted comments when OECD first revised its common approaches to address the Guiding Principles. At that time, the Global Alliance called for OECD to include explicit requirements regarding access to remedy for company-related human rights abuses, including through the provision of grievance mechanisms at the project level and at the national or export credit agency level that would be accessible to individuals and communities affected by projects.[58] Although the 2016 revision of the Common Approaches does request that export credit agencies consider measures to prevent, minimize, mitigate or remedy potential adverse environmental and social impacts, it is silent on the issue of complaints and grievance mechanisms. The issue of how export credit agencies can use their leverage to enable effective remedies has not been actively explored to date and deserves significant attention.

E. Relationship between the human rights record of a company and future support by the State

80. The Common Approaches specify that export credit agencies "should where appropriate … consider any statements or reports made publicly available by their National Contact Points (NCPs) after a specific instance procedure under the OECD Guidelines for Multinational Enterprises".[59] States that have committed to imposing trade and investment-related consequences for businesses refusing to participate in the national contact point process include Canada, Germany and the Netherlands.

81. For example, Canada has adopted an integrated approach to economic diplomacy as part of its enhanced corporate responsibility strategy for the extractive sector, which was launched in 2014. A key component of that approach is making government support in foreign markets conditional on a company's good faith participation in the two voluntary dispute resolution mechanisms, namely the Office of the Extractive Sector Corporate Social Responsibility Counsellor and Canada's national contact point. In 2015, that approach led to the withdrawal of Canadian trade commissioner services from China Gold International

[56] Regulation 1233/2011 of the European Parliament and of the Council of 16 November 2011.

[57] See Finance and Trade Watch, and CEE Bankwatch Network "*ECAs Go to Market*". The authors recommend that each export credit agency needs to have an independent complaints mechanism with clearly defined procedures and that they formulate and adopt information disclosure and public participation measures.

[58] See www.business-humanrights.org/sites/default/files/media/documents/icc-submission-to-oecd-export-credits-dec-2011.pdf.

[59] OECD Council recommendation on common approaches (2016), para. 16.

Resources after it refused to engage with the National Contact Point when a complaint was brought against it.[60]

82. The German National Action Plan also recognizes the need for linking the decisions of the National Contact Point to support in trade promotion. It includes a proposed measure that the National Contact Point be upgraded to a central complaints mechanism for projects relating to foreign trade promotion. The Plan also created a link between business participation in a specific instance procedure and the grant of export credit guarantees, providing an additional incentive for a company to participate in mediation. The Dutch National Contact Point has also committed to applying consequences to businesses that refuse to participate in its process, a commitment that will be tested for the first time in an ongoing case.

83. Three States (Germany, Switzerland and the United Kingdom) reference the linkage between national contact point procedures and export finance in their National Action Plans, although with a nuance regarding the outcome of the case versus good faith engagement by the company in the process. For example, UK Export Finance will consider any reports made publicly available by the National Contact Point in respect of the human rights record of a company when considering a project for export credit.

84. While some export credit agencies, such as that of Japan, indicate that national contact point reports (or other credible findings) will be factored into export credit decisions, to date it is unclear how or when this has happened, apart from the one example in Canada cited above. Other States should follow suit in terms of linking national contact point and other remedial processes to whether a company continues to receive trade support. In combating corruption, a company will often lose its right to participate in government procurement exercises because of a determination that it was engaged in bribery and a similar approach should be explored in relation to human rights-related complaints.

IV. Import and export restrictions to prevent trade in goods with links to human rights abuses

85. States are using restrictions on exports and imports as a means of ensuring greater corporate respect for human rights. This takes the form of export/import restrictions on certain types of goods that are linked to human rights violations in global supply chains.

86. One example is the Alliance for Torture-Free Trade, an initiative of Argentina, the European Union and Mongolia bringing together countries from around the world. Its aim is to end the trade in goods used to carry out the death penalty and torture. The countries of the Alliance commit themselves to taking measures to control and restrict exports of such products.

87. The European Union has drafted a regulation that will add certain cybersurveillance tools to the list of goods and technologies that need to be approved prior to export. The draft regulation introduces the new concept of "human security" to export controls, to prevent the human rights violations associated with certain cybersurveillance technologies. The proposal mirrors amendments to the German Foreign Trade and Payments Ordinance in 2015, which made companies that sell surveillance products subject to new mandatory export licence requirements to prevent misuse of surveillance technologies for internal repression.[61]

88. In 2016, via the Trade Facilitation and Trade Enforcement Act, the United States Congress closed a loophole in section 307 of the Tariff Act of 1930, which barred products made by convict, forced or indentured labour. Until now, the law has exempted goods

[60] See OECD Watch, "Remedy remains rare: an analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct", p. 46.

[61] See European Parliamentary Research Service briefing, available at www.europarl.europa.eu/RegData/etudes/BRIE/2016/589832/EPRS_BRI%282016%29589832_EN.pdf.

derived from slavery if American domestic production could not meet demand. Section 307 prohibits the importation of merchandise mined, produced or manufactured, wholly or in part, in any foreign country by forced or indentured child labour.[62]

89. Since 2016, U.S. Customs and Border Protection has issued four orders to seize 50 shipments of goods suspected to have been made with forced labour. There were no seizures between 2001 and 2015. On 2 August 2017, Congress passed the Countering Americas Adversaries through Sanctions Act, which contains a provision affecting the entry of merchandise with a nexus to forced labour by North Korean nationals. Since then, there have been 15 seizures of merchandise believed to have been made using North Korean forced labour.[63]

90. There are other examples of States linking import and export licensing and customs clearance to human rights issues. Trade in conflict minerals, illegal logging and conflict timber, and endangered species are other areas where States have acted to restrict the flow of goods that are associated with higher risks of human rights abuses.[64] Companies involved with global supply chains in relevant sectors must engage in human rights due diligence and impact assessments to comply with import and export restrictions. As such, the use of export and import controls is another useful tool that allows States to implement their duty to protect under pillar I of the Guiding Principles.

V. Conclusions and recommendations

A. Conclusions

91. **Many States have established export and trade promotion services as part of their economic development strategies to promote export-driven growth. At the same time, trade and exports and imports of goods in global supply chains can have significant adverse human rights impacts.**

92. **Guiding Principle 4 of the Guiding Principles on Business and Human Rights reminds States that their duty to protect rights holders from corporate human rights abuses includes a responsibility to condition public support for trade and investment promotion, such as export credits, on corporate respect for human rights. In addition to export credits, there are a range of additional services that States provide to companies that desire to export, including participation in trade missions, trade advocacy, general guidance on exporting into foreign markets, embassy services in overseas markets, and training and other resources.**

93. **To date, very little has been done in terms of States fulfilling their obligation under Guiding Principle 4. One area where progress is being made is with respect to the training of trade and embassy personnel on the Guiding Principles. Some States are also providing toolkits and guidance to help businesses address human rights due diligence in their cross-border trade.**

94. **There remains much to be done in terms of States aligning their trade promotion with the Guiding Principles and promoting a race to the top. States have done more in the way of tying trade support to commitments from businesses not to engage in bribery and to act with integrity. Where States already screen companies for trade promotion or require an integrity or no-bribery pledge, such commitments should be expanded to encompass a commitment to respect human rights.**

95. **In the area of export credits, with the exception of a few OECD-based export credit agencies, most State-supported or public export credit agencies currently appear not to be actively using the Guiding Principles as part of their decision-making**

[62] See, for example, www.cbp.gov/trade/trade-community/programs-outreach/convict-importations.

[63] See www.cbp.gov/newsroom/blogs/tflea-two-years-and-counting.

[64] See Oli Brown and others, eds., *Trade, Aid and Security: an Agenda for Peace and Development* (London, Earthscan, 2007).

on whether to extend financial support for export activities. The updated 2016 OECD recommendation on common approaches to export credit includes a requirement for export credit agencies to require applicants to undertake some form of human right due diligence with respect to projects that pose severe human rights risks.

96. While this is a positive step, to date, there are still only limited examples of good practice even among the States which are members of the OECD Export Credit Group. Furthermore, as noted in the present report, the Common Approaches still have limitations in terms of the transactions to which they apply and the fact that they leave questions over transactions that are not covered, as well as issues of access to remedy and information disclosure. Furthermore, the OECD Export Credit Group represents only a subset of the larger set of global export credit agencies.

97. As the report indicates, there is room for reform in the export credit area as part of State commitments under Guiding Principle 4. While States may commit to factoring reports from national contact points and other types of determinations into export credit agency decision-making, at present there is scant evidence that States have refused to grant trade or export credit support to applicants because of an adverse human rights determination.

98. Finally, export and import controls and restrictions seem to be a promising avenue for States to cause businesses that engage in cross-border trade to engage in stronger human rights due diligence — either as buyers or sellers. In the event that States take active measures to prevent goods such as those made with forced labour from entering markets, this does provide a strong incentive for businesses to focus on the Guiding Principles and human rights due diligence.

B. Recommendations

99. States should require businesses to demonstrate an awareness of and commitment to the Guiding Principles as a prerequisite for receiving State support and benefits relating to trade and export promotion. States should condition participation in trade missions, eligibility for trade advocacy and generalized export assistance on such commitments. Such forums and tools should be used to raise awareness of business-related human rights risks in the relevant contexts, with a particular emphasis on the risks faced by vulnerable groups and individuals. The situation for human rights defenders and trade unions should serve as a concrete benchmark.

100. States should look to see where they have required businesses to make existing integrity and anti-corruption pledges in the context of trade promotion and expand such commitments to include a commitment to respect for human rights and an alignment of business activities with the Guiding Principles.

101. States should examine how and when they have withdrawn trade or other government support from companies in the event that they are found to have engaged in foreign bribery or corruption, and determine how a similar withdrawal of support could be structured in the event that businesses have been found to have caused or contributed or been directly linked to adverse human right impacts.

102. States should also examine how to use withdrawal of trade support more actively, so as to create incentives for companies to respect human rights and engage in human rights due diligence and legitimate remediation processes. To the extent that companies know that there is a risk of losing export financing and other benefits, that may promote greater compliance with the Guiding Principles.

103. In terms of export credit, States and their export credit agencies should ensure that their practices are aligned with the Guiding Principles, not just the IFC Performance Standards. For participants in the OECD Export Credit Group, States are encouraged to look beyond the four corners of the OECD Common Approaches, to see how better to align export credit activity with the Guiding Principles. That is particularly true for transactions that fall outside the scope of the Common

Approaches (for example, short-term transactions, working capital or support for bonds). Similarly, export credit agencies should develop useful models of human rights screening and due diligence that relate to transactions that may not clearly fall under the current definition of "project" (for example, the sale of mobile equipment such as ships or communications equipment).

104. **States should consider using many of the multilateral forums that exist for export credit agencies to engage in developing good practices and further commitments relating to the Guiding Principles. Such forums include the Berne Union, the International Working Group on Export Credits, the European Union and the BRICS Export Credit Forum.**

105. **Export credit agencies should focus much more on the issue of enabling access to remedy. That includes developing better practices for evaluating, supporting and incentivizing the quality of the grievance mechanisms of their clients/applicants at the operational level. At the same time, export credit agencies also need to ensure that they have effective complaints mechanisms and that such mechanisms are readily accessible by affected parties, rights holders and communities. That is an area where the OECD Common Approaches are silent.**

106. **Export credit agencies should review their current transparency and disclosure policies and consider revising them to make more information public. Following the example of the Netherlands, export credit agencies can begin from a presumption that material is made public and then carve out narrow exemptions. There may also be a way to present some data in aggregate form or to redact confidential information but still provide civil society with key facts about both successful applications and those turned down by an export credit agency.**

107. **States are encouraged to further develop innovative measures to prevent trade in goods that are connected to serious human rights risk in global supply chains.**

108. **While the present recommendations are focused primarily on States, civil society groups are encouraged to continue their advocacy around issues of human rights, export credits and trade promotion, and to seek greater alignment of State policies and regulations with the Guiding Principles. Similarly, businesses are encouraged to work in partnership with trade promotion entities to develop and disseminate effective guidance on how business respect for human rights can be demonstrated in cross-border trade.**

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Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, prepared pursuant to Council resolutions 17/4 and 35/7.

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Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada*

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* Circulated in the language of submission and French only.

I. Introduction

1. Further to Human Rights Council resolutions 17/4 and 35/7, the Working Group on the issue of human rights and transnational corporations and other business enterprises, represented by two of its members, Surya Deva and Anita Ramasastry, visited Canada from 23 May to 1 June 2017, at the invitation of the Government. The purpose of the visit was to assess the efforts made to prevent, mitigate and address adverse human rights impacts of business-related activities, in line with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (see A/HRC/17/31, annex).

2. The experts met with government officials from federal departments and agencies (Global Affairs Canada, the Department of Justice, Employment and Social Development Canada, Indigenous and Northern Affairs Canada, the Canadian Environmental Assessment Agency, Environment and Climate Change Canada, Natural Resources Canada, Status of Women Canada, Innovation, Science and Economic Development Canada and Public Services and Procurement Canada), crown corporations (Export Development Canada, the Business Development Bank of Canada and Royal Canadian Mint), the Extractive Sector Corporate Social Responsibility Counsellor and the National Contact Point for the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development (OECD). The Working Group also met with officials from the provincial governments of Ontario, Alberta and British Columbia, the Cariboo Regional District and the city of Williams Lake.

3. Meetings were held with representatives of Canadian First Nations, civil society organizations and academia (in Ottawa, Toronto, Edmonton, Williams Lake, Vancouver and Calgary), the Canadian Human Rights Commission, the Alberta Human Rights Commission, the Toronto Stock Exchange, business associations and some of their members (the Mining Association of Canada, the Prospectors and Developers Association of Canada and the Canadian Employers Council), members of the Canadian network of the United Nations Global Compact and individual business enterprises, including Goldcorp, Imperial Metals and Suncor.

4. The Working Group thanks the Government for its support and assistance and its willingness to engage in a frank discussion on the challenges faced and lessons learned in promoting business respect for human rights. It also thanks the organizations, businesses, communities and individuals with whom it met for their openness and willingness to engage in dialogue.

II. General context

5. Canada is a federal, parliamentary, representative democracy under constitutional monarchy, with a population of more than 35 million. Canada is administratively divided into 10 provinces, 3 territories and 3,572 municipalities. While provinces are vested with their own executive, legislative and judicial powers under the Constitution, the territories have powers delegated to them by Parliament. The territories account for 40 per cent of the land mass but represent only about 3 per cent of the population.

6. Canada, which has one of the world's largest economies, is a member of OECD, the Group of Seven and the Group of 20.

7. Although Canada has a well-developed economy and ranks tenth in the 2016 Human Development Report of the United Nations Development Programme,[1] large disparities still exist between indigenous and non-indigenous peoples in the country. In his report of 2014, the Special Rapporteur on the rights of indigenous peoples highlighted the fact that, of the bottom 100 Canadian communities on the Community Well-Being Index, 96 were First Nations and only one First Nation community was in the top 100 (see A/HRC/27/52/Add.2,

[1] See http://hdr.undp.org/en/countries/profiles/CAN.

para. 15). The Working Group observed, through meetings with civil society organizations and indigenous communities, that the socioeconomic gaps between indigenous and non-indigenous peoples highlighted in the Special Rapporteur's report remained and that discrimination and sexual abuse against indigenous women and girls were pervasive.

III. Legal and policy framework

8. Canada is a party to seven core international human rights treaties.[2] Canada issued a standing invitation to the special procedures of the Human Rights Council in April 1999.

9. Canada has ratified all eight fundamental conventions of the International Labour Organization (ILO), covering freedom of association, the right to organize and collective bargaining, equal remuneration, the abolition of forced labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation. It has ratified two ILO governance conventions and 26 of the 177 ILO technical conventions.

10. The human rights laws of Canada include the Canadian Charter of Rights and Freedoms of 1982[3] and the Canadian Human Rights Act of 1977,[4] which is part of the Constitution. There are also a number of provincial and territorial human rights agencies, which are specific to their geographical areas.[5]

11. In section 91 (24) of the Constitution Act, 1867, the federal Government is given legislative authority over "Indians, and lands reserved for the Indians", and the Indian Act is the principal instrument through which federal jurisdiction is exercised in relation to First Nations.[6] In section 35 (1) of the Constitution Act, 1982, the existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognized and affirmed. In 2011 and 2012, the Government introduced modernization efforts, including the repeal of article 67 of the Canadian Human Rights Act[7] and the introduction of the Family Homes on Reserves and Matrimonial Interests or Rights Act[8] and the Safe Drinking Water for First Nations Act.[9]

IV. Awareness of business and human rights and opportunities to promote the implementation of the Guiding Principles

12. The Working Group observed a generally low level of awareness among government officials, the private sector and State-owned enterprises, with the exception of some large multinational enterprises and a small set of government officials working specifically on corporate social responsibility, of their respective duties and responsibilities under the Guiding Principles on Business and Human Rights. The Working Group noted that several companies, crown corporations and business associations used the Guiding Principles mainly as a guide for human rights due diligence in the context of business operations outside Canada, especially in the extractive sector.

13. The Working Group observed a good understanding of the Guiding Principles among civil society organizations, which were often taking the lead in seeking their implementation by both government agencies and businesses.

14. The Working Group was encouraged to learn that Global Affairs Canada had developed guidelines on supporting human rights defenders that also addressed the role of businesses in respecting their human rights[10] and was looking at best practices to provide

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[2] See http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=31&Lang=EN.
[3] Available from http://laws-lois.justice.gc.ca/eng/Const/page-15.html.
[4] Available from http://laws-lois.justice.gc.ca/eng/acts/h-6/.
[5] See www.chrc-ccdp.gc.ca/eng/content/provincial-territorial-human-rights-agencies.
[6] Available from http://laws-lois.justice.gc.ca/eng/acts/i-5/.
[7] See www.aadnc-aandc.gc.ca/eng/1394023867658/1394024066806.
[8] Available from http://laws-lois.justice.gc.ca/eng/acts/F-1.2/.
[9] Available from http://lois.justice.gc.ca/eng/acts/S-1.04/FullText.html.
[10] See http://international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng.

guidance to businesses on how to improve their human rights policies both domestically and abroad.

15. The Working Group met with the United Nations Global Compact Network in Canada and held a constructive dialogue with business representatives that were part of the network. The Working Group was particularly interested in the efforts of the network to further advance gender equality and the Sustainable Development Goals and commended the Gender Equality Forum held prior to the Working Group's visit.[11] The Working Group observed that many of the companies in the Global Compact had a good understanding of the Guiding Principles but noted that more could be done to improve the dissemination of the Guiding Principles to make more business enterprises aware of their responsibilities.

16. The Working Group welcomed the efforts of the Canadian Human Rights Commission to promote the Guiding Principles through various initiatives, such as the memorandum of understanding between OECD and the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights on business and human rights.[12] The Working Group also acknowledged the efforts of the Commission to combat discrimination and promote the principle of equal opportunity through the dissemination of information on the federal, provincial and territorial human rights laws that are applicable to employers and employees.

V. Business respect for human rights

A. In Canada

17. The Working Group heard a number of testimonies about adverse impacts of the activities of the extractive industries on the environment and human rights, including the rights of indigenous peoples throughout Canada. Civil society organizations, such as Amnesty International, Mining Watch Canada, Oxfam, the Canadian Network on Corporate Accountability and World Vision Canada, to name but a few, provided substantial information on the adverse effects of business activities on local communities and indigenous peoples who live on the traditional lands. The Working Group also received updated information from civil society actors after the completion of its mission to Canada and will continue to monitor cases and future developments.

18. Issues raised by civil society organizations included difficulties in obtaining access to effective remedies for victims of business-related human rights abuses, labour rights abuses, discrimination against women, the lack of meaningful human rights impact assessments, concerns about inadequate consultations with First Nations and the need for federal, provincial and territorial authorities to develop new laws and initiatives to enhance corporate accountability. Other concerns included the need to protect the rights of migrant and seasonal workers, the inadequate follow-up to the Mount Polley dam breach, the use of strategic lawsuits against public participation and the need for an independent ombudsperson who could investigate business-related human rights abuses carried out at home and abroad.

B. Outside Canada

19. The Working Group observed that, at the federal level, efforts to promote business respect for human rights were currently focused on extractive companies operating overseas. The corporate social responsibility strategy adopted in 2014, entitled "Doing business the Canadian way: a strategy to advance corporate social responsibility in Canada's extractive sector abroad",[13] builds upon the experience and best practices gained

[11] See www.globalcompact.ca/genderequality2017/#summary.

[12] Available from www.oecd.org/daf/inv/mne/OECD_ICC_MoU.pdf.

[13] Available from www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng.

since the launch, in 2009, of the first corporate social responsibility strategy, entitled "Building the Canadian advantage: a corporate social responsibility strategy for the Canadian extractive sector abroad".[14] In addition to these advancements, the Working Group welcomes the creation of the independent Canadian Ombudsperson for Responsible Enterprise and a multi-stakeholder advisory body on responsible business conduct to advise the Government.[15]

20. Allegations of human rights abuses committed by Canadian companies operating abroad and the lack of access to remedies for victims have been raised by international human rights treaty bodies, such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child (see CRC/C/CAN/CO/3-4, paras. 28–29). Alleged human rights abuses have also been tracked by civil society organizations. A recent report described 30 targeted deaths and 709 cases of "criminalization" associated with the operations of 28 Canadian companies during the period from 2000 to 2015.[16] Likewise, the Business and Human Rights Resource Centre database, focused on threats to human rights defenders overseas, found that, in 2017, attacks on defenders in the area of business and human rights were mainly related to the mining and agribusiness sectors and that a significant number of companies associated with such attacks were headquartered in Canada.[17]

21. The Working Group observed that the issue of human rights and Canadian extractive companies operating abroad has been a critical issue in Canadian policymaking for more than a decade. In 2006, the Government organized a series of four national round tables to examine the actions of Canadian extractive companies operating abroad in relation to human rights issues.[18] The objective of the round tables, held in Vancouver, Toronto, Montreal and Calgary, was to produce a report to Parliament containing recommendations on steps that could be taken to enable Canadian extractive sector companies operating in developing countries to meet or exceed international best practices relating to responsible business conduct. The final report of the round-table advisory group, entitled "National round tables on corporate social responsibility and the Canadian extractive industry in developing countries", was released in 2007.[19] The Working Group welcomed this initiative by the then Government and noted that the recommendations were still relevant today and should be implemented.

22. The Working Group was informed that the "Building the Canadian advantage" strategy had been developed in response to concerns by Canadians and international stakeholders about the environmental and social performance of Canadian mining and oil and gas firms abroad. Although the strategy was informed by the national round tables held in 2006, it did not implement all the recommendations from that process.

23. Bill C-300 on corporate accountability of mining, oil and gas corporations in developing countries, which was introduced in Parliament as a private member's bill in March 2011, sought to follow up on some of the recommendations from the round tables.[20] The Working Group heard from stakeholders that, although the bill had not been enacted in Parliament, it served as an indicator that the recommendations were still relevant. The Working Group therefore recommends that the Government revisit the recommendations.

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[14] Available from www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng.

[15] See www.canada.ca/en/global-affairs/news/2018/01/the_Government_ofcanadabringsleadershiptoresponsiblebusinesscond.html.

[16] See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2886584.

[17] See www.business-humanrights.org/en/key-findings-from-the-database-of-attacks-on-human-rights-defenders-feb-2017.

[18] See www.pdac.ca/docs/default-source/priorities/public-affairs/csr-national-roundtables-background.pdf?sfvrsn=720e9e50_12.

[19] Available from www.pdac.ca/docs/default-source/public-affairs/csr-national-roundtables-advisory-group-report.pdf.

[20] See https://openparliament.ca/bills/40-3/C-300/.

24. The Working Group heard from stakeholders that the federal Government's approach to business and human rights is currently covered in its corporate social responsibility strategy for the extractive sector, an important foundational document that contains many laudable initiatives on promoting the respect of Canadian extractive companies operating abroad for human rights. The strategy focuses on promoting guidance on corporate social responsibility, including the Guiding Principles, fostering networks and partnerships, facilitating dialogue towards dispute resolution and strengthening the environment around corporate social responsibility.

C. Policy instruments and policy areas relating to the Guiding Principles

Corporate social responsibility strategy of Canada

25. The Working Group noted to the Canadian authorities that the 2014 corporate social responsibility strategy was narrow in scope and encouraged Global Affairs Canada to consider a broader policy focused on business and human rights that encompasses business respect for human rights across all sectors. While the extractive sector is an important part of the Canadian economy, a range of other business sectors are also in need of human rights guidance and leadership from the Government.

Human rights due diligence

26. The Guiding Principles provide that all business enterprises should carry out human rights due diligence to identify, prevent, mitigate and account for how they address their adverse human rights impacts, covering both their own business operations and their business relationships. The Working Group heard from many stakeholders that the Government could encourage more robust human rights due diligence by extractive sector companies and should also begin to address issues such as human trafficking and modern slavery, as well as other human rights abuses in global supply chains, including in the apparel sector. The Working Group encouraged the federal Government to explore ways and means to incentivize human rights due diligence by companies, including through regulations on mandatory due diligence and disclosure. Although the Extractive Sector Transparency Measures Act[21] is an example of an important transparency measure, the Working Group observed that the Government could do more to analyse the need for human rights disclosure and due diligence in specific sectors of the economy.

Global Affairs Canada and the Canadian Trade Commissioner Service

27. The Government states that it is committed to promoting responsible business practices and that it expects and encourages Canadian companies operating abroad to respect human rights and all applicable laws and to meet or exceed international standards for responsible business conduct, including the Guiding Principles.[22]

28. Much of the corporate social responsibility mandate is carried out by the Canadian Trade Commissioner Service and related government ministries focused on natural resources, such as Natural Resources Canada. The Working Group learned that Global Affairs Canada provides its trade officers posted overseas with training on key corporate social responsibility issues relating to the extractive sector. The Working Group also learned that public servants who work in the Trade Commissioner Service receive some training on corporate social responsibility and human rights. Further training on the expectations for responsible business conduct in the Guiding Principles would help to ensure the more effective implementation of the corporate social responsibility strategy. The Working Group also noted that, in addition to training for government employees, Global Affairs Canada could play a stronger role in the dissemination of the Guiding Principles with its sister trade and export programmes at the provincial level. While the Working Group did learn of examples of training on the extractive sector and human rights-

[21] Available from http://laws-lois.justice.gc.ca/eng/acts/E-22.7/.

[22] See the corporate responsibility strategy adopted in 2014, entitled "Doing business the Canadian way: a strategy to advance corporate social responsibility in Canada's extractive sector abroad".

related issues (e.g., operations in conflict zones and artisanal mining), it was apparent that more focused training and leadership on business and human rights were needed. In addition, Global Affairs Canada might consider providing human rights training to all its employees and adopting an integrated approach to business and human rights that includes its development and foreign affairs employees.

Advisory role of the Extractive Sector Corporate Social Responsibility Counsellor

29. The Extractive Sector Corporate Social Responsibility Counsellor advises extractive companies on the implementation of corporate social responsibility standards, reviews the corporate social responsibility practices of Canadian extractive companies operating abroad and assists companies and project-affected stakeholders outside Canada with dispute resolution. The Working Group, through its meeting with the Counsellor, noted that there was a need for greater clarity as to the role of the Counsellor with respect to providing access to remedies in cases relating to human rights abuses. The Working Group was of the understanding that the value of this unique institution could be reinforced by clarifying its relationship with the Canadian National Contact Point, so as to avoid duplication of functions. It also recommends that the Counsellor focus primarily on raising awareness of, advising on and building capacity around business respect for human rights in all sectors, not solely the extractive sector. Following the Working Group's visit, it was announced that an ombudsperson would be created and assume the advisory capacity of the Counsellor, whose mandate will expire in May 2018.

Export credit

30. Export Development Canada is a crown corporation that provides a range of trade-related financing to Canadian companies for overseas investment and trade activity. In its statement on human rights, Export Development Canada recognized that investment projects may have potentially significant impacts on the human rights of individuals and that, as is the case for other financial institutions, it must endeavour to assess the potential for adverse human rights outcomes for individuals directly affected by such projects.[23] Export Development Canada conducts its own country- and project-level risk assessments that include human rights aspects, with particular attention to investment projects that have a higher potential for posing human rights risks.[24] Civil society stakeholders, however, raised the concern that the process was not transparent and that some extractive companies that had been implicated in alleged human rights abuses still received export financing. The Working Group recommends that Export Development Canada consider additional ways to communicate with stakeholders about the nature of its decision-making, the steps taken after the provision of export credit and finance and its ongoing processes to ensure that the clients that it supports and the projects in which it is involved are aligned with the Guiding Principles.

Role of provincial trade and investment offices

31. It is the Working Group's assessment that, at present, the provincial governments are not actively involved in promoting business respect for human rights as part of their trade and investment promotion activities. Since most Canadian companies are incorporated at the provincial level, provincial governments have a particularly important role in deepening respect for human rights, in line with the Guiding Principles, through their trade promotion.

32. The Working Group learned that the provincial government of Alberta has an innovative office, the Alberta International Development Office, which forms part of its Economic Development and Trade Ministry. The Office coordinates the participation of the provincial government in global development work and helps to identify new areas of collaboration between the public and private sectors, foreign Governments and international

[23] See www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Documents/human-rights-statement.pdf.

[24] Ibid.

financial institutions. Since the Office already works with the private sector to promote economic development projects abroad, it has the opportunity to ask its private sector partners to respect human rights as a prerequisite to collaborating in projects abroad. This model could be adopted by other provincial trade offices that promote Canadian business overseas.

Trade support

33. Before receiving certain types of enhanced trade services from the Canadian Trade Commissioner Service, companies are required to sign an integrity declaration to declare that they will operate in a manner consistent with the OECD Guidelines for Multinational Enterprises and that they are doing business responsibly, ethically and within the law. Equally, trade advocacy support can be denied or withdrawn if companies fail to comply with this expectation and choose not to engage in good faith with the dialogue facilitation processes of the National Contact Point or the Office of the Extractive Sector Corporate Social Responsibility Counsellor.[25] Although such withdrawal of support (referred to as a penalty by Global Affairs Canada and its Trade Commissioner Service) is mentioned frequently in connection with the enhanced corporate social responsibility strategy for extractive companies, the policy applies to all Canadian companies operating abroad.

34. While noting that the potential for loss of trade-related government support was an important policy lever for the federal Government, the Working Group highlighted that it was unclear how effective it had been in producing tangible results with respect to changes in corporate practices or in providing greater access to effective remedies for victims of corporate-related human rights abuses. The Working Group also noted that the policy was reactive in nature, as it withdrew benefits if a problem arose and, thus, did not actively seek to promote or protect human rights. To date, the withdrawal of trade support appears to have been used in only two instances. It is therefore difficult to assess how effective the tool has been or could be in the future. In addition, the provincial trade promotion entities do not have similar policies, which means that a company might lose federal support but still be able to benefit from trade promotion activities at the provincial level.

35. The Working Group recommends that, in terms of demonstrating further leadership, the Government consider other mechanisms to ensure that clear expectations are set out for companies and that respect for human rights is a condition of receiving the Government's support or benefits. This would incentivize companies to engage in human rights due diligence and examine their own processes, including operational-level grievance mechanisms. The Government is therefore encouraged to explore what sort of commitments it might require at an earlier stage. For example, Export Development Canada requires human rights due diligence as part of its application process.

Public procurement

36. The Working Group was informed that Public Services and Procurement Canada, the main procurement agency for the federal Government, was examining how its own procurement processes and code of ethics[26] might be revised to require companies seeking a government contract to engage in human rights due diligence with respect to key human rights issues, such as human trafficking. The Working Group commends the Government for looking to its own commercial transactions and relationships as a government purchaser and encourages provincial governments to examine procurement as a tool for ensuring respect for human rights in its government contracting.

[25] See the corporate responsibility strategy adopted in 2014.

[26] Available from www.tpsgc-pwgsc.gc.ca/apropos-about/code-cond-eng.html.

VI. Specific issues

A. Labour rights

37. The Working Group received information concerning labour rights abuses, in particular those pertaining to persons with disabilities,[27] irregular migrant workers, foreign temporary workers, seasonal agricultural workers and subcontractors.

38. Civil society organizations informed the Working Group that persons with disabilities still suffered stigma and faced social barriers to entering the workforce, which impeded their ability to live independently and as part of their community. In that regard, the Working Group also notes the recommendations made by the Committee on the Rights of Persons with Disabilities on the need for a policy on the employment of persons with disabilities, including indigenous persons with disabilities, and for binding affirmative action measures to promote the employment of persons with disabilities in the public and private sectors (see CRPD/C/CAN/CO/1).

39. The Working Group also heard that the federal, territorial and provincial governments should review their current legislation and ensure that it is in line with international standards, notably the Convention on the Rights of Persons with Disabilities, to which Canada is a party. Government authorities should also take additional steps to further support the access of persons with disabilities to the workplace, in line with the recommendations of the Committee on the Rights of Persons with Disabilities.

40. Civil society organizations also raised concerns about workers who are unable to freely exercise their rights to organize and create their own unions to allow them to bargain collectively. This concern was particularly prevalent for seasonal agricultural workers,[28] irregular migrant workers, foreign temporary workers and subcontractors. The Working Group is pleased that Canada ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), in June 2017[29] and recommends that the Government further implement the recommendations of the Committee of Experts on the Application of Conventions and Recommendations.

41. The Working Group heard from a number of stakeholders that irregular migrant workers, foreign temporary workers and seasonal agricultural workers are at significant risk of human rights abuses because of their irregular employment status. Reportedly, workers in irregular situations, in particular women, face harassment, including sexual harassment, and verbal or physical abuse, as they are unable to exercise their rights owing to contractual conditions.[30] Section 182 (1) of the Immigration and Refugee Protection Regulations,[31] regulating the restoration of temporary resident status, was highlighted by the Government as a successful protective measure. Federal government officials noted that there had been no reported cases in which foreign temporary workers who had lost their jobs had not been able to find another job in the allotted 90-day period.[32] This information runs counter to the information provided to the Working Group by other stakeholders in Canada. These groups of employees make important contributions to the economy but often face restrictions and barriers to their ability to access services and benefits. Irregular migrant workers, foreign temporary workers and seasonal agricultural workers are predominantly at risk of abuse as complaints may lead to them being fired or deported. The Working Group received information and read news reports about cases in which women had been forced to give sexual favours and unscrupulous employers had withheld wages and charged fees to irregular migrants, some of whom had had their passports withheld by their employers. It is therefore important that an effective mechanism be created by the federal and provincial

[27] See http://ccrweb.ca/sites/ccrweb.ca/files/tfwp-review-submission_1.pdf.

[28] See www.focal.ca/es/publications/focalpoint/457-june-2011-kerry-preibisch.

[29] The Convention will enter into force for Canada on 14 June 2018.

[30] See http://ccrweb.ca/en/canadian-ngo-report-women-and-children-migrants.

[31] Available from http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/section-182.html?term=182.

[32] See www.cic.gc.ca/english/resources/tools/temp/visa/validity/restoration.asp.

governments to monitor low-skilled and low-wage employment sectors with a prevalence of migrant workers, foreign temporary workers and seasonal workers so that their rights can be protected.

B. Women's rights

42. The Working Group appreciated the policy of both the federal and provincial governments to use the "gender-based analysis plus" tool to analyse their policies, programmes and laws.[33] The Working Group also observed, however, that certain social, economic and cultural structures in Canada still constrained the extent to which the unique experiences of women were recognized in a business context. Consequently, women continued to suffer from pay disparity, the gender division of work, harassment in the workplace and underrepresentation in top decision-making positions. In the 677 companies listed on the Toronto Stock Exchange, women occupied only 12 per cent of all board seats, and 45 per cent of those companies did not have a single woman on their boards.[34] The gender diversity disclosure requirement introduced by the Canadian Securities Administrators is a promising step, but more needs to be done to ensure that women, including those from indigenous communities, are adequately represented on corporate boards. The Working Group noted with interest bill C-25, which was introduced in September 2016 to promote corporate diversity, including by promoting the participation of women on corporate boards and in senior management positions.[35]

43. The Working Group also observed that women might be more vulnerable to discrimination and abuse because of a special working context (e.g., caregivers and call centre employees), while other women might be an easier target of violence because of the predominance of male workers in certain industries (e.g., the extractive industries). Both the Government and businesses should therefore pay special attention to preventing discrimination and sexual violence against women in those contexts and apply a gender lens to human rights and environmental impact assessments. Proactive measures should also be taken to address pay equity. The federal Government should fulfil its commitment to enact legislation to bridge the wage gap.

C. Human rights defenders and civic space

44. The Working Group was pleased to hear about the federal Government's efforts to develop policies to protect human rights defenders, such as the new guidelines on supporting human rights defenders.[36] The Working Group informed the Government that it was encouraging to see such developments given the large number of reported cases of attacks against human rights defenders linked to the operations of Canadian companies overseas.[37] The Working Group noted that, in the guidelines, it was recognized that Canadian business entities had a key role to play with respect to support for human rights defenders (see section 4.2 of the guidelines), which was an encouraging initial step. The guidelines refer companies to the 2014 corporate social responsibility strategy as a key reference point. A more explicit reference to the Guiding Principles and to respect for human rights would also be useful. The Government is further encouraged to develop training for its public servants and trade officers, as well as guidance for companies that relates more directly to the role of the private sector in ensuring respect for the rights of human rights defenders in the extractive sector and beyond.

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[33] See www.swc-cfc.gc.ca/gba-acs/index-en.html.

[34] See www.canada.ca/en/treasury-board-secretariat/corporate/reports/building-diverse-inclusive-public-service-final-report-joint-union-management-task-force-diversity-inclusion.html?wbdisable=true.

[35] Available from www.parl.ca/DocumentViewer/en/42-1/bill/C-25/first-reading.

[36] Available from http://international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng.

[37] See http://business.financialpost.com/legal-post/canadian-mining-companies-face-lawsuits-over-foreign-activities.

45. The Working Group is concerned about reports of the persecution of human rights defenders and environmentalists who have raised concerns about the operations of Canadian companies abroad. The allegations include sexual violence against and the arrest, harassment, intimidation, criminalization and even killing of human rights defenders and environmentalists.[38] The Working Group encourages the federal Government to continue to prioritize support for the work of human rights defenders and civil society organizations both at home and internationally. The Working Group also advocates that the federal Government set out a clear expectation that Canadian companies operating abroad should respect the rights of local human rights defenders and environmentalists and provide support to defenders and companies to enable the more effective protection of the legitimate activities of defenders.

46. The Working Group is encouraged by the positive work of the Government with local civil society organizations to help to develop their capacities. This type of initiative is long overdue and should draw upon the recommendations of the Special Rapporteur on the situation of human rights defenders (see A/72/170) and the Working Group's forthcoming guidance on the role of business in relation to human rights defenders who raise concerns about business-related human rights impacts.[39]

47. The criminalization of peaceful protest and the use of security personnel and police to break up and arrest activists who were exercising their democratic right to protest against business operations in Canada and in countries that host Canadian companies were raised with the Working Group.[40] The federal Government should communicate through all available channels that peaceful protest is a fundamental pillar of a strong, functioning democracy, and this message should be integrated into the training of security and law enforcement agents. Moreover, the Working Group is concerned about information concerning the misuse of legal processes and the courts as a way of silencing civil society organizations, human rights defenders and indigenous peoples who raise legitimate grievances. The Working Group heard from a civil society organization that was facing a costly legal battle merely for reporting the activities of extractive industries. The Government must do more to ensure that such types of legal actions are not used by corporations to deflect attention from genuine concerns and silence critics.

48. During the meetings with government officials in Ontario, the experts were encouraged to hear that the government of Ontario had legislation to prevent strategic lawsuits against public participation,[41] informed by the recommendations of the advisory panel on anti-strategic lawsuits against public participation legislation.[42] In its report of 2010, the panel highlighted the need for legislation to protect those who highlight issues of public interest and noted its support for the freedom of people to participate in matters of public interest.[43] This legislation is a welcome development, and the Working Group encourages the authorities in Ontario to share their experiences with other provincial government authorities to help them to develop their own legislation to prevent strategic lawsuits against public participation and build upon the work of the Ontario authorities. The Working Group also heard that the government authorities of Quebec had amended their Civil Code in 2009 so as to provide the courts with the ability to dismiss strategic lawsuits against public participation.[44]

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[38] See www.globalwitness.org/en-gb/campaigns/environmental-activists/defenders-earth/.

[39] See www.ohchr.org/EN/Issues/Business/Pages/HRDefendersCivicSpace.aspx.

[40] See www.theguardian.com/environment/andes-to-the-amazon/2014/aug/12/guatemala-gold-mine-protester-beaten-burnt-alive and www.theguardian.com/environment/andes-to-the-amazon/2015/dec/14/canada-justin-trudeau-mining-abuses-latin-america, respectively.

[41] Canada, Bill 52, Protection of Public Participation Act (2015). Available from www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=3087&detailPage=bills_detail_the_bill.

[42] See www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/.

[43] See www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.html.

[44] See www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/641-abuse-of-process-prevention/1416-legislation-on-abuse-of-process-2009.

D. Indigenous peoples

49. Indigenous peoples in Canada (First Nations, the Métis Nation and Inuit) make up about 4 per cent of the total population, representing more than 600 distinct nations and more than 60 indigenous languages, and around half of them live on their traditional lands.[45] The Working Group met with a number of individuals and groups from indigenous communities and learned of protests against several large-scale development projects, such as the proposed expansion of the Trans Mountain oil pipeline,[46] the construction of a large-scale hydroelectric dam, the Site C dam,[47] and the continued expansion of development projects of the extractive industries. In the case of the Trans Mountain oil pipeline, two reports were issued in which it was stated that adequate consultations with indigenous communities had taken place.[48] It is the Working Group's understanding, however, that not all affected groups and communities were consulted. United Nations human rights mechanisms have also repeatedly raised concerns about the adequacy of consultations with indigenous peoples affected by development projects, such as the situation of the Lubicon Lake Nation,[49] whose territories are affected by extensive oil sands extraction (see, for example, A/HRC/10/7/Add.3, A/HRC/18/35/Add.1 and E/C.12/CAN/CO/4-E/C.12/CAN/CO/5). In several indigenous territories, extensive mining and oil and gas extraction is accompanied with significant adverse environmental impacts affecting the right to health.

50. The Working Group was informed that indigenous communities, in particular those living in remote areas, did not have adequate access to safe drinking water as a consequence of environmental contamination and the lack of water treatment facilities.[50] The Working Group recommends that the Government fulfil its obligation to provide safe drinking water to all indigenous communities as a matter of priority, in line with the recommendations of the universal periodic review of Canada relating to water (see A/HRC/24/11).

51. One of the main grievances expressed by indigenous peoples was the lack of meaningful consultations and non-compliance with the requirement of free, prior, informed consent in the context of business activities on their lands. The Supreme Court established, in a series of decisions since 2014, that the Government has a legal duty to consult with indigenous peoples.[51] The Government has committed itself, as a top priority, to enhancing consultation, engagement and participatory capacity of indigenous groups in reviewing and monitoring major resource development projects.[52] This was also a key recommendation made by the Special Rapporteur on the rights of indigenous peoples in 2013 (see A/HRC/27/52/Add.2, para. 98).

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[45] See www.iwgia.org/regions/north-america/canada.

[46] See www.transmountain.com/.

[47] See www.bchydro.com/energy-in-bc/projects/site_c.html.

[48] See www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/TMX_Final_report_en.pdf and https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A77045.

[49] See www.lubiconlakenation.ca/.

[50] See, for example, www.hrw.org/report/2016/06/07/make-it-safe/canadas-obligation-end-first-nations-water-crisis.

[51] Section 35 of the Constitution Act of 1982 recognizes and affirms the rights of the aboriginal peoples of Canada, and the Constitutional Court has, in a number of decisions since 2014, clarified that the federal and provincial governments have a duty to consult indigenous peoples and, where appropriate, accommodate their views when considering actions that might adversely affect their rights, including land claims that are still to be established.

[52] Justin Trudeau, Prime Minister of Canada, "Mandate letter to the Minister of Crown-Indigenous Relations and Northern Affairs", 4 October 2017, available from https://pm.gc.ca/eng/minister-crown-indigenous-relations-and-northern-affairs-mandate-letter. The Truth and Reconciliation Commission also called for the corporate sector in Canada to commit to meaningful consultation, building respectful relationships and obtaining the free, prior, and informed consent of indigenous peoples before proceeding with economic development projects in its report entitled "Truth and Reconciliation Commission of Canada: calls to action", para. 92, available from http://nctr.ca/assets/reports/Calls_to_Action_English2.pdf.

52. A key issue is how to reconcile the duty to consult with policy commitments to ensure meaningful consultations, in line with the letter and spirit of free, prior, informed consent as set out in the United Nations Declaration on the Rights of Indigenous Peoples. The Working Group was encouraged to hear that some provincial governments, including those of Alberta and British Columbia, had created ministries of indigenous relations and specific offices to support and manage consultations with indigenous peoples, and recommends that other provincial authorities do the same.[53]

53. While the duty to consult rests with the Government, the Working Group learned that, in practice, consultations about business operations and development projects are delegated to and carried out by the business enterprises involved, with limited oversight. The Working Group observed that there was often a lack of trust among indigenous communities that consultations had been carried out in good faith, and, over the past decade, more than 100 complaints have been filed with the courts by indigenous communities about the lack of meaningful consultations on business operations that affected their rights. While most of these cases have been won by the indigenous communities, the court rulings have not prevented the projects, mainly in the extractive industries, from going forward.[54] Rather, these cases seem to have served merely as reprimands to government authorities to ensure better consultation processes in future.

54. Indigenous peoples expressed concern that initial mineral exploration could be carried out and stakes be made on land in indigenous territories without prior notification. The Working Group learned that companies are required to notify communities only when especially heavy machinery is used for mineral exploration and that, in most provinces, consultations were mandatory only as part of the request for permission to begin extraction. As a consequence, consultations begin at a stage when significant investments have already been made and are approached in a box-ticking manner, rather than with a genuine desire to obtain the informed consent of the affected communities in accordance with the principle of free, prior and informed consent.[55] Some companies are making the business case for stronger engagement with indigenous communities to ensure their social licence to operate. The Working Group, however, saw a need for stronger engagement of the federal and provincial governments to facilitate meaningful consultation processes that aim to obtain the free, prior and informed consent of affected communities and to establish trust that such processes are not biased in favour of business interests.

55. Indigenous communities should be provided with resources to improve their understanding of the implications of proposed projects on their way of life and to conduct independent, cumulative and holistic impact assessments of projects with adequate gender-sensitiveness to ensure that the voices of all members of the communities are heard.

VII. Extractive industries

56. The extractive sector was an area of particular focus during the Working Group's visit because of its importance to the economy of Canada and its global footprint. Canada is home to more than half the world's mining companies, which operate in Canada and across the globe, and is a centre for extractive sector finance, with 57 per cent of the world's public mining companies listed on the Toronto Stock Exchange and the Toronto Stock Exchange Venture Exchange. Overall, the extractive industry (mining and oil and gas extraction) accounts for about 7 per cent of the country's gross domestic product, with the mining sector as the largest private sector employer, employing some 375,000 persons.[56] It is also the country's largest employer of indigenous persons.

[53] See http://indigenous.alberta.ca/; see also www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/ministries/indigenous-relations-reconciliation.

[54] See www.lib.sfu.ca/help/research-assistance/subject/criminology/legal-information/indigenous-scc-cases.

[55] See www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf.

[56] See www.statcan.gc.ca/daily-quotidien/170331/dq170331a-eng.htm.

57. The Government has undertaken a number of initiatives to address business and human rights in the extractive sector. Canada, for example, is one of the 10 Governments that are members of the Voluntary Principles on Security and Human Rights initiative, a multi-stakeholder process created in 2000 to help extractive companies to maintain the safety and security of their operations with due respect for human rights. In 2017, the Mining Association of Canada established a requirement that its member companies that rely upon private or public security forces must commit themselves to implementing a human rights and security approach consistent with the Voluntary Principles and based on a determination of risk at the mining facilities that they control. Furthermore, members with international mining operations must report annually on the implementation of their commitment through the progress report of the Towards Sustainable Mining initiative.[57]

58. The Working Group met with key trade associations in the extractive sector and noted that those that address Canadian activity overseas made some reference to human rights and the Guiding Principles in their guidance documents. The Mining Association of Canada, for example, refers to the Guiding Principles as part of its Towards Sustainable Mining initiative.[58] At present, however, its guidance to members does not fully address concepts such as human rights due diligence as outlined in the Guiding Principles. Other associations have focused on Canadian companies operating solely at home. The Canadian Association of Petroleum Producers, for example, has focused on specific areas of responsible development, rather than human rights due diligence.[59] Industry associations have a key role to play in disseminating the Guiding Principles and in encouraging their members to incorporate respect for human rights into their business operations both at home and abroad.

59. Some companies refer to the Guiding Principles in their corporate social responsibility strategies, and the Working Group noted efforts to align such strategies with key elements of the corporate responsibility to respect human rights, such as a human rights impact assessment undertaken by Goldcorp of its Marlin mine operations in Guatemala.[60] Goldcorp made the findings of the assessment public, and the Working Group noted that this was an example of a company using a human rights due diligence framework to identify and assess human rights impacts and that more companies should undertake such assessments.

60. Under the Extractive Sector Transparency Measures Act, which entered into force on 1 June 2015, extractive companies active in Canada are required to publicly disclose, on an annual basis, payments of 100,000 Canadian dollars or more made to all governments bodies in Canada and abroad if they relate to the commercial development of oil, gas or minerals.[61] The Working Group learned that the Act was supported by the private sector as well as civil society, serving as an example of effective multi-stakeholder collaboration to increase transparency and combat corruption. From 1 June 2017, the disclosure under this act includes payments made to indigenous governments in Canada, which might provide some measure of transparency with respect to payments that may be included in agreements, such as impact benefit agreements, concluded between companies and indigenous peoples.

VIII. Lessons from the Mount Polley dam breach

61. The Working Group learned, through meetings with local officials, business stakeholders and civil society organizations, that steps have recently been taken to improve the oversight of mining operations in the aftermath of the tailings dam breach at the Mount Polley mine in 2014. The dam failure resulted in the release of 8 million m^3 of mine tailings into Polley Lake, Hazeltine Creek and Quesnel Lake. Four lawsuits have been filed by

[57] See http://mining.ca/sites/default/files/documents/TSM-Progress-Report-2016.pdf.
[58] See www.ryerson.ca/content/dam/csrinstitute/key_dates/Chalmers-8may2014.pdf.
[59] See www.capp.ca/responsible-development.
[60] See http://csr.goldcorp.com/2011/docs/2010_human_full_en.pdf.
[61] See http://laws-lois.justice.gc.ca/eng/acts/E-22.7/page-1.html.

indigenous communities over the failure to protect against the environmental pollution of the lake caused by the breach. A study of the socioeconomic impacts is being undertaken by the provincial government and the mining company but has yet to be published. Indigenous First Nations conducted their own study and identified a high level of emotional stress related to concerns about the impacts of the contamination on fisheries and sacred land. The mining company and the provincial government are monitoring impacts on water quality, providing regular updates on dedicated websites.[62] The affected community members expressed concern about the long-term health impacts of the environmental contamination and their incomprehension at the fact that, after the spill, the company had been granted permission to discharge wastewater into the lake and that no one had been held accountable for the mining dam failure. The Working Group also met with civil society organizations and received their reports, which were based on interviews with indigenous communities that had been affected by the breach.[63]

62. The Working Group learned that, at the federal and provincial levels, efforts are under way to revise existing regulations on environmental and social impact assessments. In some provinces, such as British Columbia, there is now a requirement for impact assessments and environmental projects to be reviewed for major mines in accordance with the Canadian Environmental Assessment Act. The Working Group is of the understanding that the Mining Association of Canada also revised its guidance after the breach. In the context of the very large number of extractive industry operations in indigenous territories, indigenous communities are particularly exposed to environmental and social risks. The Working Group considers that the current impact assessment processes need to be significantly strengthened and made more sensitive to social impacts and the special relationship of indigenous peoples with their lands.

IX. Access to effective remedies

63. Human rights without effective remedies do not mean much in practice. Canada has a number of mechanisms, such as courts, human rights commissions and tribunals, the National Contact Point and the Corporate Social Responsibility Counsellor, to provide remedies for business-related human rights abuses. Nevertheless, the Working Group found evidence that victims of human rights abuses continue to struggle in seeking adequate and timely remedies against Canadian businesses.

A. Ombudsperson

64. During the country visit, the Working Group was made aware of a proposal to establish a human rights ombudsperson for the extractive industries.[64] Considering the significant footprint of the operations of the Canadian extractive industries overseas, the Working Group used its meetings with government officials to highlight the need for such an ombudsperson and was pleased to hear that, on 17 January 2018, the Government had launched the creation of two new initiatives to strengthen the country's approach to responsible business conduct for Canadian companies doing business and operating abroad.[65] The first was the creation of an independent Ombudsperson for Responsible Enterprise, and the second was the creation of a multi-stakeholder advisory body to advise the Government and the Ombudsperson on responsible business conduct abroad.

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[62] See www2.gov.bc.ca/gov/content/environment/air-land-water/spills-environmental-emergencies/spill-incidents/past-spill-incidents/mt-polley.

[63] See www.amnesty.ca/news/breach-human-rights-human-rights-impact-mount-polley-mines-disaster-british-columbia.

[64] See http://cnca-rcrce.ca/wp-content/uploads/2016/03/The-Global-Leadership-in-Business-and-Human-Rights-Act-An-act-to-create-an-independent-human-rights-ombudsperson-for-the-international-extractive-sector-11022016.pdf.

[65] See www.canada.ca/en/global-affairs/news/2018/01/the_Government_ofcanadabringsleadershiptoresponsiblebusinesscond.html.

65. As stated on the website of Global Affairs Canada, the Ombudsperson will be authorized to investigate allegations of human rights abuses arising from Canadian corporate activity abroad, recommend solutions and monitor the implementation of those recommendations. It will be guided by internationally respected norms, including the Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.[66]

66. The role of the multi-stakeholder advisory body will be to advise the Government on the effective implementation and development of its laws, policies and practices relating to responsible business conduct by Canadian companies operating abroad in all sectors.[67] The multi-stakeholder advisory body will include civil society and industry members. The Working Group welcomes both initiatives by the Government and will continue to monitor the progress thereof.

B. National Contact Point

67. The National Contact Point is a committee composed of seven government departments.[68] Global Affairs Canada serves as Chair and Natural Resources Canada as Vice-Chair. The National Contact Point promotes awareness of the OECD Guidelines for Multinational Enterprises, which include a chapter on human rights that is aligned with the Guiding Principles. It also provides a forum for discussion to help to resolve issues relating to the implementation of the OECD Guidelines, including concerns about business-related human rights abuses. As part of their mandate, National Contact Points provide a mediation and conciliation platform for helping to resolve cases (known as "specific instances") of alleged non-observance of the Guidelines.[69] Information is publicly available on 17 previous cases addressed by the Canadian National Contact Point [70] and 2 ongoing specific instances.[71] The National Contact Point, which is chaired by a senior representative of Global Affairs Canada, the Director General of the Trade Commissioner Service — Operations, was perceived by stakeholders as potentially not fully independent given that it was within a ministry that was responsible for promoting overseas trade and investment. Stakeholders also noted that the National Contact Point had no external advisory or oversight body.

68. The Working Group learned that the National Contact Point had creatively used the threat of denying or withdrawing trade advocacy and economic diplomacy support as a lever against Canadian companies that refuse to engage in good faith with its mediation process. This lever was used against China Gold in 2014 after a complaint was made to the National Contact Point regarding 83 miners who were buried in a landslide at the copper polymetallic mine in Gyama, central Tibet.[72] Despite this example of a good practice, it was highlighted to the Working Group that the lack of confidence of civil society in the National Contact Point was apparent, which might have limited the number of cases brought before it. The Working Group also found it useful that diplomats posted at Canadian trade missions abroad were given training to detect at an early stage potential human rights concerns related to the business activities of Canadian companies and to inform the corporate social responsibility division at Global Affairs Canada, the Corporate Social Responsibility Counsellor and/or the National Contact Point.

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[66] See www.canada.ca/en/global-affairs/news/2018/01/advancing_canadasapproachonresponsible businessconductabroad.html.

[67] Ibid.

[68] See www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1&menu=R.

[69] See https://mneguidelines.oecd.org/Flyer-OECD-National-Contact-Points.pdf.

[70] See www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/closed-fermer.aspx?lang=eng.

[71] See www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/ongoing-en_cours.aspx?lang=eng.

[72] See www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng.

C. Courts

69. Canada has a robust and independent system of courts that can be accessed to seek remedies in cases involving human rights abuses by businesses. Despite a few recent cases being heard by courts in Ontario and British Columbia,[73] access to Canadian courts for people affected by the overseas operations of Canadian businesses remains a matter of concern. The Government should take measures to remove well-known barriers to access to judicial remedies, including for foreign plaintiffs, rather than wait for the courts to develop principles. In that respect, the guidance provided by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in its report of May 2016 to the Human Rights Council (A/HRC/32/19 and A/HRC/32/19/Corr.1), the study of the Working Group on best practices and how to improve on the effectiveness of cross-border cooperation between States with respect to law enforcement on the issue of business and human rights (see A/HRC/35/33) and the report of the Working Group on access to effective remedies under the Guiding Principles (see A/72/162) should be useful resources.

70. In 2004, the federal Government amended the Criminal Code so that companies and individual managers could be prosecuted for criminal negligence. Bill C-45, known as the "Westray amendments",[74] was a response to one of the deadliest mining incidents in Canadian history, where an explosion at the Westray mine in Pictou killed 26 underground mine workers.[75] Since the amendments took effect in 2004, there have been only 11 prosecutions in Canada, with three convictions and one person imprisoned. There have been no prosecutions in Alberta. The Working Group heard concerns that the Westray amendments were not being properly implemented and enforced and that there was a lack of coordination among key government parties, including the Royal Canadian Mounted Police, crown prosecutors and labour inspectors, with respect to securing sites of industrial accidents for further investigation and inspection. Stakeholders also noted that better coordination between the police and health and safety regulatory agencies was required.

71. The Working Group notes that the government of Alberta recently signed a new memorandum of understanding with 10 police forces. The memorandum defines the protocols for notification, investigation and communication between departments when there is a serious workplace incident. This will help investigators from all agencies to coordinate information to determine whether criminal charges may be warranted in addition to penalties for occupational health and safety violations. This is a promising initiative and other provinces may want to follow the lead of Alberta in exploring how better protocols can be implemented to prevent workplace deaths and injuries and to promote greater access to remedies in Canada.

X. National action plan

72. Canada was one of the first countries to undertake a multi-stakeholder dialogue on a national strategy to promote responsible business conduct, through the round-table discussions held in 2006. Many of the recommendations from that process remain relevant and could serve as a basis for renewed efforts to address the gaps identified in implementing all three pillars of the Guiding Principles. Building upon the work already undertaken to identify ways to strengthen business respect for human rights among Canadian companies abroad, it is also important to turn attention to the promotion of business respect for human rights in the country. In that regard, the Working Group encourages the federal Government to work with provincial governments to develop a national action plan on business and human rights in order to chart out the main business-related human rights risks, improve access to effective remedies and develop a mechanism

[73] Supreme Court of British Columbia, *Garcia v. Tahoe Resources*, judgment of 13 November 2015; and *Araya v. Nevsun Resources*, judgment of 9 January 2017.

[74] See www.justice.gc.ca/eng/rp-pr/other-autre/c45/.

[75] See www.cbc.ca/news/canada/nova-scotia/westray-remembered-explosion-killed-26-n-s-coal-miners-in-1992-1.1240122.

to share good practices among provinces on how to ensure respect for human rights by businesses.

73. The round tables held in 2006 to formulate a corporate social responsibility strategy for the extractive sector demonstrated that it is possible for the Government, business and civil society to find common ground. The Working Group found, however, that there was some frustration with respect to the fact that several of the joint recommendations made more than 10 years ago were still to be implemented. The development of a national action plan on the basis of the guidance[76] and general recommendations of the Working Group could serve as an opportunity to revisit the round-table recommendations, renew dialogue across main stakeholder groups and expand the scope of corporate social responsibility strategies to cover business respect for human rights in Canada as well as abroad.

XI. Conclusions and recommendations

A. Overall remarks

74. An overriding issue observed by the Working Group was the absence of a coherent policy framework for the State duty to protect against business-related human rights abuses and promote effective business respect for human rights, a problem that is exacerbated by the complexity of the overlapping and competing competencies of the federal and provincial levels of government. The federal Government is responsible for the oversight of business enterprises that are federally incorporated only (about 11 per cent of the 2.6 million businesses incorporated in Canada). The regulation and oversight of all other companies fall under the jurisdiction of individual provincial governments, each with their own independent regulatory framework.

75. The Working Group was encouraged to learn about the Government's efforts in providing training to overseas trade missions, in using levers to withhold and/or deny trade advocacy and economic support to punish companies that do not cooperate in good faith with the dispute resolution mechanism and in developing corporate guidance with respect to human rights defenders.

76. Areas in which the Government needs to intensify efforts include the need for a holistic environmental impact assessment strategy, the need to meet the requirement for free, prior and informed consent when holding meaningful consultations with indigenous peoples, responses to the exploitation of migrant workers and the further development of policies and guidelines to help to combat discrimination against women, building upon the "gender-based analysis plus" tool. The Working Group also saw a need for further clarification of the roles of the Corporate Social Responsibility Counsellor and the National Contact Point as a way of reducing barriers to access to justice, including for overseas victims of Canadian companies.

77. The Working Group was encouraged to hear from government authorities at the provincial and federal levels that they were committed to improving human rights at home and abroad and that there was political will to advance the human rights agenda. The Working Group was also pleased to see that there was a very active civil society in Canada that was involved in promoting business respect for human rights. Furthermore, the Working Group found inspiration from the testimonies of individuals from indigenous communities who shared their experiences and demonstrated their resolve to seek justice, improve the human rights of their communities and protect their traditional lands.

78. The Working Group saw the need for businesses, business associations and civil society to be more engaged in promoting and raising awareness of the Guiding Principles.

[76] Available from www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf.

B. Recommendations to the Government

79. **The Working Group recommends that the Government:**

(a) **Ensure that the Office of the Canadian Ombudsperson for Responsible Enterprise is well resourced, financially and with skilled personnel, so that it can provide effective and timely remedies and recommendations for complaints. Furthermore, the Office should have total independence from the Government, undertake meaningful investigations and have the investigatory powers to summon witnesses and compel stakeholders to produce documents and any other powers as are necessary to fully address human rights abuses;**

(b) **Ensure that the multi-stakeholder advisory body on responsible business conduct is staffed with independent personnel who have no conflict of interest and that the board is composed of an equal number of individuals from the various industry and civil society sectors, has gender balance and has one seat specifically for an indigenous representative;**

(c) **Take steps to enhance the effectiveness of the National Contact Point in providing remedies, make the National Contact Point more independent and vest it with adequate resources to discharge its mandate. The National Contact Point should include findings about breaches of the OECD Guidelines in final statements, improve transparency in its functioning and try to regain the trust of civil society in its utility as a provider of remedies. The peer review of the Canadian National Contact Point in February 2018 and the forthcoming report should be used as opportunities to address some of these concerns;**

(d) **Clarify more clearly the respective roles of the National Contact Point and the Canadian Ombudsperson for Responsible Enterprise, including with respect to advising companies, a role previously carried out by the Corporate Social Responsibility Counsellor. The Working Group suggests that the Counsellor should have a broader role in promoting business respect for human rights across all business sectors, not solely the extractive sector, and should focus primarily on raising awareness, advising and building capacity around business respect for human rights, while the National Contact Point and the newly established Ombudsperson could provide effective non-judicial remedies;**

(e) **Ensure that its existing and future trade and investment agreements include adequate safeguards to protect the environment and human and labour rights;**

(f) **Ensure respect for human rights in its own role as an economic actor through the development of policies on the basis of principles 4 and 6 of the Guiding Principles, for example, policies relating to public procurement, State-owned enterprises or crown corporations, export credit and development banks;**

(g) **Ensure that Export Development Canada considers ways to improve its internal processes to ensure public confidence in it, such as including human rights as a core pillar of its objectives and releasing an annual human rights report;**

(h) **Ensure that Global Affairs Canada explores additional tools of economic diplomacy that it could leverage to promote greater business respect for human rights;**

(i) **Ensure that provincial governments encourage industry associations and individual companies to respect human rights while conducting business, both domestically and overseas, using the Guiding Principles as a baseline to assess business respect for human rights;**

(j) **In the case of the Mount Polley incident, and in order to prevent such incidents in future, ensure the completion of the impact study and continue to monitor closely the short- and long-term impacts of the tailings discharge. All findings should be communicated to the affected communities in a fair, transparent and well-timed manner. The Working Group also recommends that the person or persons responsible**

for the breach be held accountable for their actions and that the affected communities be notified of all future discharge permits. The Working Group further recommends that the Government implement the recommendations relating specifically to the Mount Polley breach and those relating to the situation of indigenous peoples highlighted in the concluding observations of the Committee on the Elimination of Racial Discrimination (see CERD/C/CAN/CO/21-23);

(k) Work with the provincial and territorial governments to strengthen access to both judicial and non-judicial remedial mechanisms;

(l) Encourage businesses to establish operational-level grievance mechanisms in conformity with the effectiveness criteria stipulated in principle 31 of the Guiding Principles and in accordance with the recommendations of the Working Group in its 2017 report to the General Assembly (see A/72/162);

(m) Address barriers for individuals and communities affected by the overseas operations of Canadian businesses to seek effective remedies in Canada in appropriate cases. Implement the policy recommendations of OHCHR and the Working Group (see A/72/162, A/HRC/32/19 and A/HRC/35/33);

(n) Encourage businesses to give more attention to how the Guiding Principles can help to improve business respect for human rights in Canada, for example, by ensuring meaningful stakeholder engagement processes and strengthening company-based grievance mechanisms and human rights due diligence in high-risk sectors;

(o) Ensure that immediate action is taken, in conjunction with federal, provincial and territorial authorities, to investigate the disappearances of indigenous women[77] and prioritize their safe, secure return and recommendations from civil society to end violence against women and girls;[78]

(p) Strengthen mechanisms for sharing information and good practices between federal and provincial authorities, as well as across departments at the federal and provincial levels, through regular meetings of federal and provincial ministers;

(q) Implement the principle of free, prior and informed consent set out in the United Nations Declaration on the Rights of Indigenous Peoples and ratify the Indigenous and Tribal Peoples Convention, 1989 (No. 169), and conduct wide consultations with all stakeholders to implement the Declaration in the context of the existing regulatory frameworks in place at the federal and provincial levels;

(r) Develop a gender-sensitive national action plan to implement all three pillars of the Guiding Principles.

C. Recommendations to businesses and industry associations

80. Business enterprises should take steps to implement pillar 2 of the Guiding Principles through policy commitments to respect human rights, human rights due diligence, remediation policies and operational-level grievance mechanisms.

81. Business associations should take proactive measures to encourage and build the capacity of their members to respect human rights, in line with the Guiding Principles, including by organizing peer-learning workshops.

82. Businesses should apply a gender lens when conducting human rights impact assessments, administering operational-level grievance mechanisms and negotiating impact benefit agreements. They should also show sensitivity to the special relationship of indigenous peoples with their lands in conducting informed and

[77] See www.amnesty.ca/our-work/campaigns/no-more-sto'en-sisters.

[78] See www.amnesty.ca/blog/16-things-canada-can-do-now-end-violence-against-indigenous-women-and-girls.

meaningful consultations in accordance with the principle of free, prior and informed consent.

83. **Businesses and business associations should develop policies that address the protection and promotion of human rights defenders both in and outside Canada.**

84. **Businesses should initiate informed and meaningful consultations with affected communities as early as possible, including at the stage of staking claims for extractive industry projects. Furthermore, rather than engaging only chiefs and band councils, consultations should be conducted widely with the communities that may be affected by proposed business activities.**

D. Recommendations to civil society organizations

85. **The Working Group recommends that civil society organizations:**

(a) **Continue to raise awareness about the obligations and responsibilities of the State and business enterprises under the Guiding Principles to prevent and address adverse human rights impacts related to the operations of business enterprises and to promote access to justice and grievance mechanisms;**

(b) **Continue to document and raise before all appropriate national, regional and international forums cases of human rights violations and abuses, in particular those committed against environmentalists and human rights defenders;**

(c) **Engage in a multi-stakeholder process to contribute to the development of a national action plan on business and human rights, and facilitate the full participation of all stakeholders, including indigenous peoples and women.**

E. Recommendation to the Toronto Stock Exchange

86. **The Toronto Stock Exchange should encourage its members to respect human rights in line with the Guiding Principles and to proactively develop policies in that regard.**

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Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Peru

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Peru from 10 to 19 July 2017.

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Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Peru*

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* Circulated in the language of submission and Spanish only.

I. Introduction

1. Pursuant to Human Rights Council resolutions 17/4, 26/22 and 35/7, the Working Group on the issue of human rights and transnational corporations and other business enterprises, represented by two of its members, Michael Addo and Dante Pesce, visited Peru from 10 to 19 July 2017, at the invitation of the Government. The purpose of the visit was to assess the efforts that have been and are being made to prevent and address the adverse impact on human rights of business-related activities, in line with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.

2. During their visit, the experts met with communities and representatives of indigenous peoples in Lima and in the Regions of Cajamarca, Loreto, Apurimac and Cusco. They met with government officials from the Office of the President of the Council of Ministers (including the Office of the Deputy Minister of Territorial Governance, the Office of the Secretary for Social Management and Dialogue, the Office of the Undersecretary for Dialogue and Sustainability and the Office of the Undersecretary for Prevention), the Ministry of Foreign Affairs, the Ministry of the Interior, the Ministry of Justice and Human Rights, the Ministry for Women and Vulnerable Groups, the Ministry of Development and Social Inclusion, the Ministry of Culture, including its General Directorates of Intercultural Citizenship and of the Rights of Indigenous Peoples, the Ministry of the Environment, the Ministry of Energy and Mining, the Ministry of Labour and the Promotion of Employment and the Ministry of the Economy and Finance. They also met with representatives of the regional governments of Loreto, Cajamarca, Cusco and Apurimac, members of Congress (the commissions dealing with indigenous peoples and the environment and with energy and mining) and representatives of the Supreme Court and the Office of the Ombudsman.

3. In addition, the experts met with representatives of civil society organizations, trade unions, academia, the United Nations system, the diplomatic community, the Working Group on the Voluntary Principles on Security and Human Rights, business associations, including the National Confederation of Private Business Associations, which coordinates the Peruvian United Nations Global Compact Network, and the National Mining, Oil and Energy Society. The Working Group also met with representatives of the Peruvian Stock Exchange and individual business enterprises, both State-owned and private, including the National Fund for the Financing of the Public Sector Companies, Perupetro S.A., Petróleos del Perú (Petroperú S.A.) and the mining companies Yanacocha and Las Bambas.

4. The Working Group is grateful to the Government for the support it provided, its facilitation of the visit and its willingness to engage in a discussion on current initiatives and challenges faced in aligning policies and practices with the Guiding Principles. It is also grateful for the support provided by organizations, communities and representatives of business enterprises and wishes to thank them for their openness and willingness to engage in dialogue with the Working Group.

II. General context

5. Peru has been one of Latin America's fastest-growing economies for the past 10 years. Economic growth has led to growth in employment and income and, despite significant disparities from region to region and between rural and urban areas, a reduction of income poverty from 42.4 per cent in 2006 to 20.7 per cent in 2016. According to official statistics for 2016, the incidence of poverty in rural areas (43.8 per cent) was three times higher than in urban areas (13.9 per cent), while the incidence of extreme poverty — considered to have been largely eradicated in the richest regions and departments, such as Arequipa, Ica and Lima — was estimated to be between 16.6 and 23.3 per cent in

Cajamarca.[1] It is thus clear that to achieve the objectives of inclusive, sustainable development, much is still to be done.

6. Over the past decade, successive Governments have promoted foreign direct investment as a main policy objective, and the number of concessions granted for mining and drilling operations has exploded. The mining sector accounts for the largest share of foreign direct investment, at around 24 per cent.[2]

7. During its visit, the Working Group received information from civil society actors and local communities on alleged adverse business-related human rights abuses, including abuses connected with the environmental and social impact of large-scale projects, violations of labour rights exacerbated by the pervasiveness of informal work and the large number of business-related social conflicts.

8. The Working Group observed a growing awareness among government and business officials that the promotion of investment must ensure respect for human rights and encourage sustainable development. It learned about efforts to mitigate the negative impact of business-related activities and improve the consultation and dialogue processes engaged in by the Government, businesses and local communities in a bid to address the problem of social conflicts.

9. The aspiration of Peru to become a member of the Organization for Economic Cooperation and Development (OECD) requires the adoption of new policies and regulatory frameworks, including in areas such as investment, the environment, labour relations and public procurement, and compliance with the OECD Guidelines for Multinational Enterprises, in particular the chapter on human rights, which is aligned with the Guiding Principles. Consequently, the effective implementation of the Guiding Principles is also important to the country's pursuit of OECD membership.

III. Legislative and policy framework

10. Peru is a representative democratic republic divided into 25 regions. The executive branch is headed by the President, who presides over the Cabinet (Council of Ministers). The legislative branch consists of a 130-member unicameral congress.

11. The Peruvian Constitution recognizes a comprehensive list of human rights that must be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements that have been ratified by Peru.

12. Peru is a party to all nine core international human rights treaties and has ratified or acceded to seven of the nine optional protocols.[3] In 2007, Peru signed the United Nations Declaration on the Rights of Indigenous Peoples. The country reports regularly to the human rights treaty bodies and has extended a standing invitation to the special procedure mandate holders of the Human Rights Council since 2002.

13. Peru has ratified the eight fundamental conventions of the International Labour Organization (ILO), which cover freedom of association, forced labour, discrimination and child labour. It has not ratified any of the four ILO governance conventions, which address employment policy, tripartite consultation and labour inspection. It has ratified ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169).

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[1] See www.inei.gob.pe/media/cifras_de_pobreza/pobreza2016.pdf.

[2] According to official figures, 86 per cent of foreign direct investment is concentrated in the mining (24 per cent), financial (18 per cent), communications (18 per cent), industrial (12 per cent) and energy (14 per cent) sectors. See www.investinperu.pe/modulos/JER/PlantillaStandard.aspx?are=1&prf=0&jer=6037&sec=17.

[3] Peru has not ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights or the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

14. Peru is a party to the main human rights instruments of the inter-American system and recognizes the competence of the Inter-American Court of Human Rights.

15. The Working Group recognizes the efforts made by the State in recent years to strengthen its legal framework for the promotion and protection of human rights, in particular the rights of persons with disabilities, indigenous peoples and women, to address child labour and to penalize forced labour.

IV. Awareness of business and human rights

16. The Working Group welcomes the political willingness of the Government to implement the Guiding Principles and the inclusion of a section on business and human rights in the Human Rights Plan 2018–2021, as part of which Peru undertakes to conduct a participatory and inclusive process for the development in 2019 of a specific national action plan on business and human rights.[4] The Working Group has encouraged all States to develop such action plans,[5] and it hopes that the present report will inform this important process in Peru.

17. The Working Group observed that the connections between different policy areas and the business and human rights agenda were generally not sufficiently understood or explored, underlining the need for the policies of government ministries and departments to be more coherent, in particular the policies of those leading on human rights issues and those shaping business practices. The process of developing a national action plan should help make policy more coherent, not least by ensuring that initiatives in the areas of business and human rights, competitiveness and sustainable investment are linked.

18. The Working Group heard from business enterprises and associations that corporate human rights due diligence was considered part of normal good business practice. However, the Working Group heard less about how actual human rights risks and cases of abuse had been identified, in particular in the context of recurrent social conflict related to large-scale business operations. Business associations pointed out that despite efforts made by their members, business activities in the large informal economy, which were associated with adverse effects on human rights, posed major problems.

19. While there seemed to be a growing awareness of the responsibility of businesses to respect human rights, the Working Group also found that much more needed to be done to encourage and incentivize businesses to exercise human rights due diligence. Human rights due diligence, as the Guiding Principles indicate, should be ongoing, carried out prior to major decisions or changes in an operation and involve meaningful consultation with potentially affected groups and other relevant stakeholders. How impacts are identified and addressed should be communicated. Otherwise, policy commitments will not translate into effective action. Business associations can play a critical role in promoting human rights due diligence by their members.

20. The Working Group learned from the National Fund for the Financing of the Public Sector Companies, the entity responsible for regulating and coordinating State corporate activity, that it was committed to implementing the Guiding Principles. The Working Group welcomes this commitment, which, however, still needs to be translated into concrete guidance and incentives for State-owned enterprises to exercise human rights due diligence. The Government should ensure that State-owned or other government-controlled enterprises lead by example in implementing the Guiding Principles, in line with the recommendations made by the Working Group.[6]

[4] Supreme Decree No. 002-2018-JUS (1 February 2018).

[5] See www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf.

[6] A/HRC/32/45.

V. Issues related to large-scale development projects

A. General observations

21. Recurrent themes in reports of alleged business-related human rights abuses included abuses connected to social conflict in the context of large-scale projects, inadequate environmental, social and human rights impact assessments and labour-related abuses linked to the country's large informal sector.

Social conflicts

22. According to the Office of the Ombudsman, an average of 200 social conflicts a year were recorded during the period 2014–2017, of which a majority were related to business operations in the mining (45 per cent), hydrocarbon (10 per cent), energy (5 per cent) and agribusiness (2 per cent) sectors. During the same period, these social conflicts resulted in 49 deaths (43 civilians and 6 members of the security forces) and injuries to approximately 1,410 people (775 civilians and 635 members of the security forces).[7] Although the number of deaths and injuries has fallen since 2016, the Working Group deplores the large number of people killed or injured in social conflicts. In the period 2016–2017, social conflicts resulted in the deaths of 12 persons and injuries to 287; in the period 2014–2015, such conflicts led to the deaths of 37 persons and to injuries to 1,123.

23. The main causes of social conflict linked to large-scale business operations were, according to information received by the Working Group, concerns about adverse effects on health and the environment, inadequate transparency and access to information and the limited participation of interested parties in decision-making processes. In addition, companies underscored the problem of operations being located in regions where the State has little presence and where inequality and poverty prevail, a factor that increases community expectations of the benefits of a given project. Local communities and companies were sometimes left to address local grievances on their own, without government support, and negotiations were frequently held in locations far from where the conflicts actually occurred.

24. The Working Group would like to stress that the meaningful participation of all persons who might be affected by the outcome of the process should be encouraged in every decision-making process. To that end, people should have transparent and easy access to all pertinent information relating to business activities, the impact of those activities and the sharing of benefits. The consultations that are mandatory for projects affecting indigenous peoples would also be relevant for non-indigenous peoples and communities, not least to identify and mitigate the adverse impact of those projects on human rights, in line with the Guiding Principles and the Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, developed by OECD.

25. The Working Group heard that agreements reached by affected communities with a company and the State were usually not honoured.[8] It was pleased to learn that the Office of the Deputy Minister of Territorial Governance had established a database of 2,638 existing commitments made by the State and other parties since 2010 in the context of dialogue forums; actions to honour 1,565 of the commitments are pending. The Working Group also noted that the Standing Multisectoral Commission on the Application of the Right to Consultation had formally begun monitoring the implementation of agreements between the State and indigenous peoples reached through processes of prior consultation carried out according to Act No. 29785, the Prior Consultation Act.

[7] Peru, Office of the Ombudsman, Monthly reports on social conflicts, Nos. 119–166 (January 2014–December 2017).

[8] World Bank, "La consulta previa en el Perú. Desafíos y aprendizajes" (2016).

26. The Working Group was informed of social conflicts stemming from land disputes and allegations that land had been acquired by businesses without due regard for the land rights of indigenous and non-indigenous communities.

27. The Working Group was pleased to hear that a new approach to social dialogue and consultation was being taken to provide more venues for dialogue, promote the participation of interested parties and formalize land titles. The establishment of the new Office of the Deputy Minister of Territorial Governance in March 2017 and of the Social Progress Fund for Education, Infrastructure and Health Care in areas where the extractive industry operates appeared to be steps in the right direction.[9]

Environmental, social and human rights impact assessments

28. The Working Group learned about repeated public health emergencies declared in relation to industrial pollution. In this regard, the Working Group acknowledges steps taken by the Government to strengthen environmental institutions. However, more needs to be done to assess environmental and social effects, including the impact on human rights, in the processes conducted to approve, assess and monitor business projects. More should also be done to secure the effective participation of affected communities in these processes.

29. The Working Group was informed that environmental studies in relation to large-scale projects occur at two different stages: before granting exploration and exploitation concessions and, to verify that operations are in line with environmental rules, once a project has been launched. First, an environmental impact assessment is conducted by an independent contractor and then reviewed by the Ministry of the Environment's National Environmental Certification Service for Sustainable Investments. The assessment, which gives consideration to environmental and social impacts, does not look into how a proposed project will affect human rights.[10] On the basis of the impact assessment, the Ministry of Energy and Mining decides whether to grant a licence for exploration or exploitation.[11] The mandate of the Environmental Assessment and Enforcement Agency, also part of the Ministry of the Environment, is to assess environmental damage or the risk thereof and to monitor compliance with the obligations contained in impact assessments. The Agency can order a company to take remedial measures or take punitive action against it.

30. The Working Group welcomes the Certification Service's commitment to further emphasizing the social aspects of impact assessments. However, the incorporation of social and human rights criteria should be formalized.

31. During its visit to Apurimac Department, the Working Group learned that communities affected by the Las Bambas Mining Project were not consulted when amendments were made to the impact assessment of the Project. The amendments were linked to a change in the means whereby copper concentrates were to be transported. Instead of being transferred by slurry pipeline, they would be hauled overland. As a result, 300 trucks a day, loaded with copper concentrates and chemicals, covered a distance of nearly 500 km each over unpaved roads through remote rural communities, shaking the land and buildings, raising dust and endangering livestock. The failure to consult the communities affected by the increased traffic contributed to the escalation of social unrest in 2015, during which four people were killed and others were injured.[12] The Working Group had a constructive dialogue with managers at the mine and was given information about the company's commitment to engaging in dialogue with communities about their grievances in a safe and peaceful manner.

[9] See www.state.gov/e/eb/rls/othr/ics/2017/wha/270090.htm.

[10] See www.senace.gob.pe/certificacion/ventanilla-unica/.

[11] Act No. 30705 (20 December 2017).

[12] Peru, "Fiscalización ambiental: construyendo confianza y facilitando la inversión" (Environmental Assessment and Enforcement Agency), pp. 43–44. Available from www.oefa.gob.pe/en/publicaciones/fiscalizacion-ambiental-construyendo-confianza-y-facilitando-la-inversion.

32. The Working Group was also informed of the adoption of a number of legislative decrees from 2013 to 2015 that, seeking to boost investment, had weakened environmental regulations and oversight.[13] Act No. 30230 of 2014 prevented the Environmental Assessment and Enforcement Agency from imposing direct fines on polluting companies for a period of three years, except in the most serious cases. Moreover, the period for completing impact assessments was shortened, negatively affecting the feasibility of more inclusive and participatory environmental assessments. The Working Group welcomes the congressional decision of April 2017 to restore the Agency's power to impose fines.

33. The Working Group also learned about other regulations that would weaken environmental protections, such as a draft decree that would lower air quality standards and increase the limits on exposure to sulfur dioxide by a factor of 12.[14]

B. Cases concerning specific sectors

34. The Working Group could not analyse all the reports of business-related human rights abuse it received, but it looked at a number of emblematic ones in specific business sectors.

Mining sector

35. The mining sector has been growing in Peru, and the country is currently the world's third largest producer of copper and silver and the sixth largest producer of gold.[15] The Working Group was informed of numerous allegations that mining operations had had adverse effects on human rights, including damage to the environment that affected human health. Mining operations have also been associated with land disputes and concerns about land acquisitions through coercion or deception.

36. One case that has attracted international attention is the struggle of a farmer, Máxima Acuña de Chaupe, and her family in Celendín, Cajamarca, to remain on land that was being claimed by the mining company Minera Yanacocha for a new mining operation. Ms. Acuña de Chaupe and her family informed the Working Group of the intimidation, threats and harassment they had been repeatedly subjected to. As a result of those acts, the Inter-American Commission on Human Rights had requested the adoption of precautionary measures for members of the family and 46 other local community leaders involved in protests against the mining project.[16]

37. Minera Yanacocha, a joint venture between Newmont Mining (51.35 per cent), Minas Buenaventura (43.65 per cent) and the International Finance Corporation (5 per cent), initiated several legal cases, both civil and criminal, against Ms. Acuña de Chaupe and her family. On 3 May 2017, after a five-year trial, the Supreme Court ruled in the criminal case that the family had not illegally occupied the land bought in 1994, that it had not committed any crime, as had been alleged by the company, and that the issue of title to the property should be settled through civil proceedings.

38. The Working Group was encouraged by the decision of Newmont Mining Corporation, as majority shareholder of Minera Yanacocha, to request an independent fact-finding mission to examine the dispute. The mission, which based its analysis on the Guiding Principles, concluded, inter alia, that the company's "failure to conduct adequate human rights due diligence is one factor that has contributed to a situation where the human rights of the family have been at risk from the outset of the land dispute and have continued to be put at risk as the conflict has unfolded" and that "finding a pathway towards a

[13] Supreme Decree No. 054-2013-PCM, Supreme Decree No. 060-2013-PCM, Act No. 30025, Act No. 30230, Supreme Decree No. 001-2015-EN and Act No. 30327.

[14] Ministerial Decision No. 094-2017-MINAM.

[15] See https://assets.kpmg.com/content/dam/kpmg/pdf/2016/03/peru-mining-country-guide.pdf.

[16] Inter-American Commission on Human Rights, resolution 9/2014, precautionary measure No. 452-11 (5 May 2014).

resolution has been delayed by a strategy that prioritized litigation over dialogue".[17] The Working Group considered the steps taken to commission the study and release it publicly as positive and encouraged the company to bring its policies and practices into line with the mission's recommendations.

39. The Working Group learned that the adverse health and environmental impact of mining operations had led to the declaration of several environmental and public health emergencies since 2012. In June 2017, for example, the Ministry of Health declared a 90-day public health emergency in the districts of Chaupimarca and Simón Bolívar in Pasco Department in response to contamination (lead and other heavy metals) from mining operations.[18] Concerns about young children, who are particularly vulnerable to the toxic effects of lead, which can cause irreparable cognitive impairment, are particularly great.

40. The Office of the Ombudsman of Cusco reported in 2015 that blood concentrations of most heavy metals exceeded permissible limits in the Province of Cusco.[19] The Working Group was informed of concerns about inaction in this regard. A Cusco regional health plan meant to address the problem of heavy metals in Espinar Province, for example, had not been implemented. Moreover, a study to assess links between water contamination and mining operations has been ongoing since 2015.

41. The Working Group was informed that in La Oroya, in Junín Region, heavy metals had been found in the blood of the people living near the Doe Run metallurgical complex. As a result, in 2007 and 2016 the Inter-American Commission on Human Rights had sought precautionary measures for 79 residents, requesting the Government to provide specialized medical diagnoses and medical treatment to those who were at risk of irreparable damage to their personal integrity or life (the requests were not fully complied with, however).[20] The mining company Doe Run has been sanctioned 20 times by the Environmental Assessment and Enforcement Agency and fined $8 million.

42. The Working Group learned that environmental damage caused by mining is also pronounced in small-scale illegal operations, where there is no oversight of compliance with environmental, labour and health safeguards. Workers allegedly endure extreme health and safety conditions, and forced labour, child labour and other forms of exploitation, including sexual and labour trafficking, are said to be widespread.[21]

Oil and gas sector

43. The Working Group received several reports concerning adverse environmental and health impacts related to the oil and gas sector, including oil spills. These reports are consistent with sanctions imposed by the Environmental Assessment and Enforcement Agency on oil and gas companies and repeated declarations of environmental emergencies. The Working Group met with affected communities whose members voiced concerns about adverse impacts on their health and their ability to continue relying on fisheries and farming for their livelihoods.

44. The Working Group was informed that in the past 40 years, there had been approximately 60 spills, 13 of them in 2016 alone, from the Norperuano pipeline, operated by the State-owned company Petroperú. According to Petroperú, many of the spills had been deliberate, caused ostensibly by persons seeking to gain employment in subsequent clean-up operations. Other observers, however, including regional officials, were of the view that most of the spills were caused by inadequate maintenance. Petroperú had been

[17] See www.resolv.org/site-ytflm/files/2015/08/YTFM-report_280916-Final.pdf.

[18] Supreme Decree No. 020-2017-SA.

[19] Letter No. 0330-2015-DP/OD-CUSCO/PA.

[20] Inter-American Commission on Human Rights, resolution 29/16, precautionary measure No. 271-5.

[21] Teodoro Sanz, "Caracterización de las condiciones de trabajo forzoso en la minería de oro en Madre de Dios y una aproximación a los factores de riesgo" (ILO, 2015).

sanctioned 57 times for the damage to the environment and human health caused by its operations, including oil spills.[22]

45. The Working Group also learned about the adverse impact of the activities of the company Pluspetrol in the Amazonian rainforest, including in block 192 (previously known as 1AB) and block 8 in the Province of Iquitos. On acquiring licences for those blocks, Pluspetrol had accepted legal responsibility for any environmental damage.[23] In August 2015, however, the company reportedly left block 192 without cleaning up the affected sites or remediating the damage caused by spills attributed to its operations. As a result, Peru declared several states of environmental emergency, and the Environmental Assessment and Enforcement Agency issued 15 sanctioning resolutions for breaches of environmental regulations.

46. The Working Group underscores the State's obligation to hold companies accountable for the adverse impact on human rights caused by their activities and uphold the right of indigenous communities to give free, prior and informed consent to the granting of oil and gas concessions by which they are affected. In this regard, the Special Rapporteur on the rights of indigenous peoples and the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes have called on Peru to suspend negotiations on relicensing block 192 "until the right to free, prior and informed consent is guaranteed, and all environmental damage has been remedied".[24]

47. The Working Group observed considerable social conflict over operations on the lands of indigenous peoples. There are no precise official figures for the percentage of the blocks granted in concession that is indigenous land, whether titled or held by custom. According to the Government, however, approximately 50 per cent of licensed areas for oil and gas operations in the Amazon region of Peru currently being explored or exploited overlap with the titled land of indigenous communities, including reserves set up for peoples living in a situation of isolation or initial contact.[25]

Large-scale agriculture

48. Between 2010 and 2014, according to a 2017 study by the Office of the Ombudsman, more than 30,000 hectares of forest in the Amazon basin was cleared to make way for oil palm and cacao plantations in areas inhabited mostly by indigenous peoples.[26] Some plantations had reportedly been developed without the required licences. Concerns about illegal deforestation led the Round-Table on Sustainable Palm Oil to declare publicly that Plantaciones de Pucallpa, part of the Melka Group, which cleared more than 5,000 hectares of land, including primary forest, was in violation of Round-Table rules. As a consequence, the Melka Group was delisted from the London Stock Exchange.[27]

49. The Working Group was informed that the Government did not have exact data on the extent of those plantations and that there was a need for further studies of soil conditions and capacity at the national and local levels. The Working Group also learned that a national plan on sustainable oil palm development had been proposed and welcomed the Ministry of Agriculture's efforts to hold prior consultations with the indigenous communities identified as potentially affected. The Working Group encourages the

[22] Directorate Decision No. 878-2016-OEFA.

[23] See Environmental Assessment and Enforcement Agency, report No. 411-214-oefa / DH-HID, and Petroperú, legal report LEGL -0747-2014.

[24] Press statements of 15 December 2014 and 13 July 2017. See, for example, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21871&LangID=E.

[25] See www.ohchr.org/Documents/Issues/IPeoples/SR/CamiseaProjet.pdf.

[26] Peru, Office of the Ombudsman, "Deforestación por cultivos agroindustriales de palma aceitera y cacao. Entre la ilegalidad y la ineficacia del Estado", report No. 001-2017-DP/AMASPPI.MA (June 2017).

[27] See www.rspo.org/members/complaints/status-of-complaints/view/88.

Ministry to open the consultations to all potentially affected communities, identified in a participative manner, and review the proposed plan accordingly.[28]

50. The Working Group was informed of the steps taken by the State to protect forests and limit land-use changes.[29] At the same time, the Working Group's interlocutors expressed concern about the insufficient implementation of existing regulations. For example, despite regulations providing that agricultural activities are not environmentally viable in protected areas, licences for extensive plantations have still been approved in such areas in the Amazon basin. The Working Group learned that environmental impact assessments of agribusiness projects were approved without prior soil studies in the relevant areas.

51. Land-grabbing reportedly occurred in the context of land acquisition for plantations. According to the information received by the Working Group, it took the following forms: (a) acquiring public lands for oil palm or cacao projects; (b) granting certificates of possession, which, under former legislation, made it possible to acquire the title after a certain period of use and possession, and then transferring the title to companies promoting such projects; and (c) buying private land from locals through intermediaries and the use of coercion and deception.[30]

VI. Specific issues

A. Labour rights

52. The Working Group was encouraged to learn about legislative and regulatory developments aimed at promoting access to the labour market for people with disabilities, combating forced labour and child labour and advancing gender equality at work.[31] The results, according to information received by the Working Group, had so far been limited by the failure to implement existing legal and policy frameworks effectively and the prevalence of informality in the labour market.

Freedom of association and collective bargaining

53. The Working Group was informed that only 6 per cent of formal workers in the private sector and 13 per cent in the public sector were unionized. A number of civil society and union representatives attributed this situation to the routine dismissals of and attacks and judicial complaints against workers who joined trade unions.[32] Collective bargaining and freedom of association were reportedly undermined by the widespread use of short-term contracts, as noted in a number of complaints submitted by Peruvian workers or their representatives to ILO.[33]

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[28] Ministerial Decision No. 281-2016-MINAGRI (3 May 2016).

[29] Forestry and Wildlife Act No. 29763, the Regulations for Forest Management and Supreme Decree No. 018-2015-MINAGRI.

[30] Juan Luis Dammert Bello, "Acaparamiento de tierras en la Amazonia peruana. El caso de Tamshiyacu" (Wildlife Conservation Society, 2017).

[31] These developments included the adoption of acts on persons with disabilities and on equal opportunities for men and women, the criminalization of forced labour, the implementation of a plan to combat forced labour, the issuance of a decree that established a national commission to combat forced labour and the development of a national strategy for the prevention and eradication of child labour. The Standing Multisectoral Committee to Combat Trafficking in Persons and the Illicit Trafficking of Migrants was established by Decree No. 001-2016-IN (9 February 2016).

[32] See www.ilo.org/dyn/normlex/es/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3523561.

[33] See, for example, case No. 3069 (Peru).

Labour informality

54. Government officials informed the Working Group that informality affected 72 per cent of workers in Peru, in particular in small companies and micro-enterprises.[34] The Working Group is concerned that the prevalence of informal employment undermines the effective protection of labour rights, including in terms of social protection, minimum wage, working conditions, security and health. The Working Group was also informed that cases of human trafficking and modern slavery, as well as violations of environmental and social norms, were found in the informal sector, in particular in illegal mining and logging.

55. The Working Group was encouraged to learn that the Government had made efforts to curb informality, including by establishing the Social Protection Commission.[35]

Child labour

56. According to the latest survey on child labour, 26.1 per cent of children in Peru aged between 5 and 17 worked, and 16.8 per cent (1.25 million) were involved in hazardous work, as defined by ILO, in particular in agriculture, fishing and mining (together, these sectors accounted for 60 per cent of all child labour and 58.4 per cent of hazardous child labour).[36] The Working Group was pleased to learn that policies and legislation have been adopted to combat child labour and hazardous or abusive work. However, it encourages the Government to enforce these measures, not least by ensuring that the necessary budget and institutional capacity are provided and that employers' practices, including in the illegal mining sector, are monitored.[37] The Working Group also endorses raising the legal minimum age for admission to employment to 15, the age of the end of compulsory education, as recommended by the Committee on the Rights of the Child.[38]

Persons with disabilities

57. The Working Group was encouraged to see that several innovative measures have been taken with a view to improving the employment situation of persons with disabilities and addressing the workplace discrimination they suffer.[39] Such persons still face discrimination in accessing employment, however. Only 15 per cent of them are employed, mainly because they lack the educational backgrounds sought by employers.[40]

Gender discrimination

58. The Working Group noted with concern that, despite some improvements, women face discrimination, in access to the labour market, wage discrimination and discriminatory conditions of work, including harassment.[41] The Working Group therefore welcomes recent

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[34] See www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---sro-lima/documents/genericdocument/wcms_550373.pdf and www.inei.gob.pe/media/MenuRecursivo/noticias/nota-de-prensa-n205-2016-inei.pdf.

[35] Ministerial Decision No. 017-2017-ef/10.

[36] See www.ilo.org/ipecinfo/product/download.do?type=document&id=28857.

[37] E/C.12/PER/CO/2-4, para. 7.

[38] CRC/C/PER/CO/4-5, para. 66.

[39] Under Act No. 27050, the General Act on Persons with Disabilities, there are quotas for the employment of persons with disabilities. Such persons should account for 3 per cent of the payroll of private sector employers with more than 50 employees and 5 per cent of that of public sector institutions. The Act also provides for tax deductions for employers whose workforces are composed of at least 30 per cent persons with disabilities. See www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3241899:NO.

[40] See https://disiswork.com/blog/situacion-laboral-de-personas-con-discapacidad-en-peru/ and www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3241899:NO.

[41] According to national statistics, women in Peru on average earned 28.6 per cent less than men in 2015, see www.inei.gob.pe/media/MenuRecursivo/publicaciones_digitales/Est/Lib1388/Libro.pdf.

initiatives to address these problems, such as the dissemination of a handbook on preventing and sanctioning sexual harassment in the workplace.[42]

59. Civil society organizations reported to the Working Group that the Government has no policy or legislation to address the employment and workplace discrimination suffered by lesbian, gay, bisexual, transgender and intersex people. Information on their situation is scant, and it was suggested that discriminatory practices are rarely reported because of entrenched intolerance.

Forced labour

60. Cases of forced labour and human trafficking were reported to the Working Group, especially in illegal logging and mining. Indigenous peoples and children are the most severely affected. The efforts made by the authorities to tackle these issues included the adoption of the National Plan of Action for the Eradication of Forced Labour 2013–2017, Act No.1323, under which penalties for forced labour were introduced, and the National Plan to Combat Trafficking in Persons 2017–2021.[43]

Labour inspection

61. The Working Group was informed of the establishment of the National Labour Inspection Authority and its nine regional offices, a positive step towards respect for labour regulations and human rights in the workplace.[44] The authorities highlighted the need for more resources, including extended representation in the field, to fully carry out their mandate.

B. Indigenous peoples

62. The indigenous population of Peru, which, according to official figures, is at least 7 million (approximately 40 per cent of the country's population), is one of the largest in the region.[45] The Working Group observed that, because they have particular ties to their ancestral lands and natural resources and because extractive projects often operate in areas used or surrounded by indigenous peoples, the indigenous peoples of Peru are disproportionately affected by the adverse impact of corporate activity. The Working Group notes that this vulnerability is exacerbated by the long history of discrimination against indigenous peoples.

Right to consultation and free, prior and informed consent

63. International standards stipulate that prior and informed consultation of communities affected by business operations is critical to obtaining the consent of those communities, preventing and mitigating adverse impacts and addressing grievances. The Working Group

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[42] Decision No. 005-2017-MTPE/2 of the Office of the Deputy Minister. Available from http://legis.pe/wp-content/uploads/2017/12/Publican-Guia-practica-para-la-prevencion-y-sancion-del-hostigamiento-sexual-en-el-trabajo-Legis.pe_.pdf.

[43] Decree No. 017-2017_IN.

[44] Three governmental entities have labour inspection duties in Peru: the Ministry of Labour and Promotion of Employment (Act No. 28806), the National Labour Inspection Authority, created in 2013 to centralize the labour inspection process and increase the Ministry's inspection and enforcement capacity (Act No. 29981), and the Regional Directorates of Labour and Promotion of Employment in each of Peru's 26 regions (Act No. 27867). Position of the Government of Peru with respect to the questions submitted by the Government of the United States of America on the submission presented by ILRF, Perú Equidad and seven Peruvian workers' organizations related to the labour chapter of the U.S.–Peru TPA (4 December 2015.)

[45] These data are taken from the 2012 census and are based solely on language criteria. Therefore, there is no centralized information on the number of campesino and indigenous communities. The 2017 census includes a category for indigenous people, but the results have not yet been released.

therefore welcomed the adoption of Act No. 29785, the Prior Consultation Act, which was informed by ILO Convention No. 169, and its subsequent regulation.[46]

64. The Working Group was pleased to learn that in March 2017, the Fourth Specialized Court on Constitutional Matters of Lima ordered the annulment of a contract for oil exploration and exploitation in block 116, located in El Cenepa, on the grounds that the right to prior consultation of the native communities concerned had been violated.[47] The ruling states that prior consultation was compulsory starting on the date of the entry into force (in 1995) of ILO Convention No. 169, not the date of the entry into force (in 2011) of the Prior Consultation Act. That ruling, if upheld, would set a precedent, as consultations would have to be organized for 13 other hydrocarbon contracts. Perupetro and the Ministry of Energy and Mining have filed an appeal against the court order, a decision on which is pending before the Lima High Court.

65. The Working Group was also informed that 46 prior consultation processes had been carried out and that 6 were currently ongoing. The processes are supported by the Ministry of Culture's Office of the Deputy Minister for Intercultural Affairs and the competent authorities. Civil society organizations noted that indicating exactly when prior consultations should be carried out was a good practice and encouraged similar specifications for the consultations on mining-related issues.[48]

66. The Working Group understood that the award of concessions for oil and gas or mining projects did not strictly require prior consultations with the communities potentially affected, since such concessions did not constitute "authorization for the holder to carry out exploration, exploitation or mineral extraction".[49] In this regard, the Working Group noted that consultations should be held before all decisions that might affect the rights of indigenous peoples and that the award of concessions for potential mining activities on indigenous land is certainly one such decision. Indigenous peoples should also be consulted before prospecting decisions, decisions on launching projects or shutting them down and strategic planning decisions, such as the definition of initiatives for attracting investment and the priority to be given to extractive operations in efforts to promote economic development. In the same vein, the Working Group was pleased to hear that the Supreme Court has stated that consultations should also take place on environmental impact assessments.[50]

67. The Working Group notes the importance of allocating adequate resources to ensuring the informed participation of indigenous peoples in such processes, including through the provision of legal and technical assistance, and of giving special attention to the inclusion of women, who may otherwise be excluded.

68. Some businesses enterprises and business associations informed the Working Group that, in practice, the consultation processes offered them a tool to make their investments more sustainable and improve relationships with local communities. In this regard, the Working Group emphasized that meaningful consultations should be a central aspect of human rights due diligence for business enterprises to identify concerns and grievances early on and ensure that all aspects of their operations are respectful of the rights of indigenous peoples, in accordance with international standards.[51] However, the Working Group noted with concern that the representatives of some businesses denied the presence of indigenous people as such in the areas where their businesses operated.

[46] Supreme Decree No. 001-2012-MC.
[47] Ruling No. 32365-2014 (Lima, 7 March 2017).
[48] Ministerial Decision No. 209-2015-MEM/DM.
[49] Ministerial Decision No. 003-2013-MEM/DM, annex 1.
[50] Ruling No. 32365-2014 of the Fourth Constitutional Court (Lima, 7 March 2017).
[51] A/HRC/27/52/Add.3, paras. 31–55; CCPR/C/PER/CO/5, para. 24.

Database of indigenous peoples

69. The Working Group was informed that some self-identified indigenous peoples were not recognized for purposes of the right to consultation on some large-scale projects in the database of indigenous peoples maintained by the Ministry of Culture's Office of the Deputy Minister for Intercultural Affairs, which argued that they were not indigenous since they were not registered in the database. However, the Ministry of Culture informed the Working Group that the database was merely a reference tool that was continuously updated and that even if an indigenous community was not included in it, the community's collective rights under ILO Convention No. 169 were not affected. The Working Group is of the view that providing indigenous people with more information about the database and involving them in its development, not least in respect of the inclusion of Andean indigenous peoples, could put an end to these diverging perceptions.

C. Human rights defenders and civic space

Human rights defenders

70. The Working Group was alarmed by the large number of human rights defenders and local leaders reportedly killed, attacked or threatened for defending the environment and land rights.[52] In addition, numerous people who had participated in social protests against the impact of business activities on human rights informed the Working Group that they had faced criminal charges and been subjected to various forms of intimidation and stigmatization.

71. There were reports that legislation had been adopted that has worsened the situation for human rights defenders in the country. Examples included a legislative decree on combating criminal organization, which extends the time limit on pretrial detention and stiffens the penalties for criminal organization.[53] Community leaders stated that they had faced criminal charges for extortion for allegedly disrupting the provision of public services or legally authorized work while taking part in protests to demand respect for human rights.

72. The Working Group reiterates the recommendations of the Human Rights Committee urging the Government to consider adopting legislation decriminalizing defamation, as the criminalization thereof poses a threat to the freedoms of opinion or expression, and to conduct effective investigations of reports concerning attacks against human rights defenders.[54]

73. The Working Group was encouraged to learn that the Ministry of Justice had elaborated a protocol to process complaints relating to attacks against human rights defenders. In addition, the new National Action Plan on Human Rights proposes the creation of a mechanism for the protection of human rights defenders by 2021 and a database to track threats to their safety by 2019. The Guiding Principles highlight the key role human rights defenders can play in human rights due diligence and in enabling companies to understand the concerns of stakeholders. In particular, the Guiding Principles underscore the need for businesses to consult human rights defenders as an expert resource and highlight their role as watchdogs, advocates and facilitators. States, according to the Guiding Principles, should ensure that the legitimate activities of human rights defenders are not obstructed.

74. The Working Group noted that establishing a clear line of work on human rights defenders in the Office of the Ombudsman would help make it possible to monitor the

[52] A total of 87 human rights defenders were reportedly murdered from 2011 to 2016. Annual report 2015/16 of the National Human Rights Coordinating Office, April 2017, p. 64. See http://derechoshumanos.pe/informe2015-16/Criminalizacion-de-la-protesta.pdf.

[53] Legislative Decree No. 30558 (9 May 2017) amending article 2 (24) (f) of the Constitution, Legislative Decree No. 1244 (29 October 2016), and Legislative Decree No. 1298 (23 December 2016).

[54] See CCPR/C/PER/CO/5, para. 22.

situation of human rights defenders systematically and push for additional measures to address the situation.

Use of State security forces in the context of social protest

75. It was pointed out that new laws and policies had further shrunk civic space, notably in terms of the use of force by police and deployment of the Armed Forces in public security operations. Legislative Decree No. 1095, for instance, authorizes the deployment of the Armed Forces for public security operations, including protests, and states of exception have repeatedly been declared in the context of social protests — 25 such states were declared in 2015 alone. Under the Decree, the police may use lethal force to deal with "hostile groups". As highlighted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the definition of "hostile groups" in the law is so wide that it could encompass members of social protest movements who were not carrying any weapons.[55] Furthermore, the Decree states that the military courts will have jurisdiction over proceedings initiated in response to any illicit conduct by soldiers during protests.

76. The Working Group heard about many social protests that resulted in violent clashes with the police and the Armed Forces and a number of deaths, mainly of civilians, but also of police officers. The larger number of civilian deaths may suggest a disproportionate use of force. According to the National Human Rights Coordinating Office, only one of the civilian deaths during a protest since 2002 has led to a conviction.

77. The experts visited Cotabambas, where, against the backdrop of social unrest related to a mining project, 3 people were killed and 15 were arbitrarily arrested.[56] The Inter-American Commission on Human Rights states that controlling disturbances that may be produced internally by social protest demonstrations is up to the police, whose function is geared towards public security and not the security of the State.[57]

78. The Working Group was heartened to learn that Act No. 1186 had repealed provisions that had given police officers immunity for the injuries and deaths they caused in their official capacity and that the Government had brought regulations on the use of force by the Peruvian National Police into line with applicable human rights standards.[58]

Extraordinary police services provided to companies

79. Concerns were repeatedly voiced about the legal framework allowing companies to hire police officers to provide extraordinary police services.[59] The result, in practice, is that police officers who are off official duty, wearing police uniforms and carrying police weapons are paid to provide security services to private companies. The Working Group is of the view that this practice creates confusion over the constitutional role of the National Police, which is to protect the people, and gives rise to perceptions that they serve private interests.

80. The Working Group was informed that steps have been taken to limit the role of off-duty police officers who provide security services to private companies under agreements

[55] See A/HRC/16/51/Add.3.

[56] "Las Bambas: violaciones de derechos humanos y protesta social", National Human Rights Coordinating Office and Instituto de Defensa Legal, 2015.

[57] See www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf.

[58] Legislative Decree No. 1186, on the use of force by the personnel of the Peruvian National Police, was regulated by Supreme Decree No. 012-2016-IN of July 2016. As a result, on 22 March 2016 the Directorate General of the National Police issued a handbook on operations for maintenance and restoration of public order. Moreover, Ministerial Decision No. 487-2018-IN ordered the prepublication of the draft of human rights handbook for police officers.

[59] Legislative Decrees No. 1267 and No. 1268.

concluded by those companies and the Peruvian National Police.[60] However, it believes that such agreements should be avoided altogether.

VII. Access to remedy

A. State-based judicial mechanisms

Judicial mechanism

81. The Working Group noted the concerns from civil society groups and local communities that the formal judicial system generally appeared to be on the side of the more powerful. Another key concern was the transfer of judicial proceedings to jurisdictions far from the locations of the events that prompted the proceedings. This situation was reportedly exacerbated by a decision of the judicial authorities to assign jurisdiction over cases linked to social unrest during states of emergency to the National Criminal Court.[61]

82. The Working Group was encouraged to hear the national courts have increasingly incorporated international standards in cases where businesses are involved. The Constitutional Court recognized the right to consultation of indigenous people in line with relevant international instruments. In March 2017, a high court ordered the cancellation of a contract for oil exploration and exploitation in block 116, located in El Cenepa, because it was found that the right to prior consultation of the native communities had been violated and that consultations should also have preceded the environmental impact assessments.[62]

83. The Working Group encourages the State to include a new article in the Criminal Code with a view to ensuring that legal persons, including corporations, can be held responsible for their criminal acts, as recommended by the Committee on the Rights of the Child.[63]

B. Non-judicial grievance mechanisms

Office of the Ombudsman

84. The Office of the Ombudsman was established as an independent national human rights institution in the 1993 Constitution. It has 38 offices around the country and can receive complaints about cases of human rights violations. It produces reports and makes recommendations but has no power to impose sanctions. A number of the areas in which the Office is active, including efforts to combat corruption, the monitoring of social conflict and reporting on deforestation, are of direct relevance to business and human rights. The Office's ability to receive complaints regarding business operations is a welcome one. However, the Working Group is of the view that the knowledge of business and human rights of the staff members located throughout the country should be strengthened to allow the Office to play a greater role in promoting access to effective remedies for victims of corporate-related human rights abuses and be involved in the development of and follow-up to the National Action Plan.

National Contact Point

85. As a signatory to the OECD Guidelines on Multinational Enterprises, Peru has established a National Contact Point. The Contact Point has focused mainly on raising awareness of the Guidelines, which contain a chapter on human rights aligned with the

[60] Legislative Decree No. 1267 and Supreme Decree No. 003-2017-IN of 21 February 2017, under which guidelines for the provision of police services were adopted.

[61] Administrative Decision No. 136-2012-CE-PJ.

[62] Ruling No. 32365-2014 of the Fourth Constitutional Court (Lima, 7 March 2017).

[63] CRC/C/OPSC/PER/CO/1, para. 28.

Guiding Principles. The Contact Point is in ProInversión, a government agency that is part of the Ministry of the Economy and Finance and works mainly to promote private investment. The Working Group noted with concern that there seemed to be hardly any awareness of the Contact Point mechanisms among people at risk of business-related human rights abuses. The Contact Point should also enjoy greater independence and be authorized to handle and resolve complaints in a genuinely impartial manner. Moreover, a multi-stakeholder support component should be established to enhance the Contact Point's visibility and legitimacy.

Operational-level grievance mechanisms

86. During its visits to the mining sites of Yanacocha in Cajamarca and Las Bambas in Apurimac, the Working Group learned about the companies' efforts to establish operational-level grievance mechanisms. The companies explained that the design of these mechanisms had been informed by the effectiveness criteria set out in the Guiding Principles (principle 31).

VIII. Conclusions and recommendations

General comments

87. **The Working Group welcomes the measures taken by the Government of Peru to implement the Guiding Principles, including the commitment to develop a national action plan on business and human rights and the institutional and policy measures adopted to address social conflicts, a majority of which arise in the context of business operations. The Working Group stands ready to continue the dialogue on how to develop and implement such measures in order to ensure that they align with international good practice.**

88. **A key finding of the visit was the need to further strengthen mechanisms for multi-stakeholder engagement when business-related decisions are made. The meaningful participation of all stakeholders includes providing them with access to clear information on adverse business-related impacts on human rights and on other measures that, taken in the pursuit of economic growth, might affect them, such as special agreements between companies and the Government.**

89. **The Working Group makes the following recommendations to the Government, business enterprises and civil society organizations.**

90. **The Working Group recommends that the Government:**

(a) **Build capacity and raise awareness among public authorities, including judicial authorities and lawmakers, of the Guiding Principles on Business and Human Rights;**

(b) **Amend legislation and regulations to close current gaps in human rights protection, in particular concerning indigenous peoples' rights to land and natural resources, the rights to a healthy environment and to health and the right to freedom of expression and assembly, and reinforce mechanisms to monitor compliance with existing legislation and relevant human rights instruments, including ILO conventions;**[64]

(c) **Take an inclusive approach, involving all relevant ministries and a multi-stakeholder engagement process, including human rights defenders, indigenous peoples, civil society organizations, trade unions, business organizations, companies, legal and bar associations and the Office of the Ombudsman, to developing a national action plan on business and human rights. Attention should be given to protection**

[64] See also CERD/C/PER/CO/18-21, para. 17, CEDAW/C/PER/CO/7-8, para. 32, CMW/C/PER/CO/1, paras. 16–17, and A/HRC/29/40/Add.2, para. 86 (g).

from discrimination-related human rights abuses, such as discrimination against women, lesbian, gay, bisexual, transgender and intersex persons and persons with disabilities, and to strengthening access to remedies, judicial or not, for victims of business-related human rights abuses;

(d) Take measures to ensure that prior and informed consultations are held with indigenous peoples and other communities affected by development projects and business operations and that they are held at all stages of decision-making that might affect those communities, in accordance with international standards concerning the rights of indigenous peoples, including with regard to their free, prior and informed consent. Such measures should include further guidance and support for consultation processes, setting deadlines for consultations and the stages thereof, taking additional steps to ensure informed participation, such as providing legal and technical assistance and full access to information, and imposing effective sanctions for non-compliance;

(e) Create a dedicated body/institution responsible for the implementation of consultations with indigenous peoples, independent of the ministry in charge of granting concessions or in control of the State-owned companies involved;

(f) Take measures to secure the inclusive and balanced participation of all interested parties, giving special attention to supporting the inclusion of vulnerable groups that may otherwise be left out, and to ensure that communities are adequately informed of the expected positive and negative outcomes of development projects;

(g) Scale up the work of the Office of the Deputy Ministry of Territorial Governance to facilitate dialogue and strengthen participatory mechanisms, while building on the lessons learned from the two similar bodies that preceded it,[65] while also scaling up the work of the Ministry of Agriculture and regional authorities to continue the process of formalizing individual and collective land rights;

(h) Require State-owned enterprises to embed respect for human rights in their policies and procedures and exercise human rights due diligence, in line with the Guiding Principles;

(i) Provide guidance to State-owned and private companies on human rights due diligence, including on how they should make their efforts to identify human rights risks public and what steps they should take to prevent and address them. In sectors where risks to human rights are especially significant (mining, oil and gas, agribusiness), the Government should consider introducing mandatory reporting and human rights due diligence;

(j) Strengthen measures to assess the environmental and social sustainability of agribusiness projects, including through countrywide studies of the soil and its capacity in different regions and an assessment of the recent development of large-scale plantations. Such studies and assessments should inform the National Plan of Sustainable Oil Palm Development, to which a multi-stakeholder engagement approach should be taken;

(k) Integrate human rights aspects into systems and procedures for environmental impact assessments;

(l) Scale up efforts to curb labour informality;

(m) Take measures to address obstacles to freedom of association and collective bargaining, in line with ILO recommendations, including investigating and punishing attacks against and murders of trade unionists, engaging in dialogue on the subject of protection from anti-union discrimination against workers with the

[65] The Ministry of the Environment's Advisory Office on Social and Environmental Affairs, established in 2011, and the National Office for Dialogue and Sustainability of the Office of the President of the Council of Ministers, established in 2012.

workers' and employers' organizations concerned and reviewing labour regulation that allows consecutive short-term contracts;

(n) Scale up efforts to address child labour and forced labour, including improved data collection and improved use of existing tools and policies, such as the National Plan of Action for the Eradication of Forced Labour;

(o) Strengthen the institutional capacity of the Labour Inspection Authority to exercise oversight of companies' practices, including by ensuring that it has the personnel and resources for labour inspections in all regions, a mandate to carry out inspections without prior notification and effective powers of sanction;

(p) Raise the legal minimum age for admission to employment to the age of the end of compulsory education (15 years);

(q) Promote education and learning opportunities for persons with disabilities and take measures to facilitate their access to the labour market;

(r) Adopt a new national gender-equality plan based on an assessment of current gaps and challenges and the status of the National Plan 2012–2017, as recommended by the Committee on the Elimination of Discrimination against Women;[66]

(s) Assess and address the discrimination faced by lesbian, gay, bisexual, transgender and intersex people in accessing the labour market and in the workplace;

(t) Update the database of indigenous peoples regularly and involve indigenous peoples themselves in the process, while taking into account the criterion of self-identification;

(u) Strengthen the protection of human rights defenders, including by adopting legislation to counter strategic lawsuits against public participation to ensure that defamation laws do not prevent human rights defenders from raising concerns about adverse business-related human rights impacts and by developing mechanisms to address attacks against human rights defenders and physically protect such defenders from attacks and intimidation. The Government is also encouraged, together with other States, to engage with the ongoing efforts of the Working Group to develop guidance on the role of business with regard to human rights defenders;[67]

(v) Take measures to address instances of excessive use of force by law enforcement officials and members of the security forces, including by strictly limiting the use of the military for civilian law-and-order tasks, and promptly, impartially and effectively investigate allegations of excessive use of force, as recommended by the Human Rights Committee;[68]

(w) Publicly disclose existing agreements between private companies and the Government to provide security services and take steps to discontinue the practice of making such agreements;

(x) Remove barriers to effective judicial remedies, in line with policy recommendations made by the Office of the United Nations High Commissioner for Human Rights and the Working Group,[69] **and provide assistance to vulnerable groups to ensure that they can access judicial mechanisms in an accessible, affordable, adequate, timely and non-discriminatory manner;**

(y) Increase the effectiveness of State-based non-judicial grievance mechanisms, including by enhancing the capacity of the Office of the Ombudsman to

[66] CEDAW/C/PER/CO/7-8.
[67] See www.ohchr.org/EN/Issues/Business/Pages/HRDefendersCivicSpace.aspx.
[68] CCPR/C/PER/CO/5.
[69] A/HRC/32/19; A/72/162.

handle business-related human rights complaints, raising awareness of the National Contact Point mechanism and strengthening its independence and capacity.

91. **The Working Group recommends that all business enterprises, including private enterprises and State-owned enterprises:**

(a) **Take steps to fulfil their responsibility to respect human rights, including by: adopting a human rights policy; carrying out human rights due diligence to identify, prevent, mitigate and account for how they address human rights risks and the adverse effects of their activities; and providing for/collaborating in providing access to remedy when they have caused or contributed to human rights abuses;**

(b) **In assessing the actual or potential adverse impact on human rights, ensure meaningful consultation with potentially affected individuals and communities, paying attention to potentially vulnerable or marginalized groups and ensuring that they have timely and complete information about proposed projects or changes that may affect them and their capacity to voice their opinions;**

(c) **Ensure that affected communities have free and transparent access to information, in particular concerning the expected negative impact of projects, the sharing of benefits and the availability of grievance mechanisms;**

(d) **Establish/strengthen grievance mechanisms at the operational level in accordance with principle 31 of the Guiding Principles;**

(e) **Pay specific attention to how the impact of business operations on the human rights of some groups, such as indigenous peoples, who tend to have a special relation to their ancestral lands and natural resources, and women, may differ from their impact on those of other groups;**

(f) **Refrain from taking measures to target people who exercise their legitimate right to speak up against the potential or actual adverse impact of business operations and instead recognize the importance of engaging constructively with human rights defenders and the stakeholders they represent.**

92. **The Working Group recommends that civil society organizations:**

(a) **Continue to raise awareness of the respective obligations and responsibilities of the Government and business enterprises under international human rights law;**

(b) **Continue to champion the rights of affected communities and human rights defenders;**

(c) **Engage in the process of developing a national action plan on business and human rights through multi-stakeholder dialogue that includes the voices of affected communities;**

(d) **Follow up on the Working Group's recommendations and share with it information on relevant developments.**

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Human rights bodies and mechanisms

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on the sixth session of the Forum on Business and Human Rights

Note by the Secretariat

The present report, prepared in accordance with Human Rights Council resolutions 17/4 and 35/7, describes the proceedings and thematic recommendations of the sixth session of the Forum on Business and Human Rights, held from 27 to 29 November 2017. It should be read together with the Forum programme, session concept notes, statements, and session web recordings, which are available on the Forum website.[1]

[1] www.ohchr.org/2017/ForumBHR

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I. Introduction

1. Since its first session in 2012, the Forum on Business and Human Rights has become the world's biggest event on business and human rights. It was established by the Human Rights Council in its resolution 17/4, in which the Council also endorsed the Guiding Principles on Business and Human Rights: implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31, annex). The mandate of the Forum is to discuss trends and challenges in the implementation of the Guiding Principles, to promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, and to identify good practices.

2. The Forum is organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and guided and chaired by the Working Group on the issue of human rights and transnational corporations and other business enterprises. The present report was prepared by the Working Group in accordance with Human Rights Council resolution 35/7, in which the Council invited the Working Group to submit a report on the proceedings and thematic recommendations of the Forum to the Council for its consideration. In the present report, the Working Group provides an overview of key observations and messages emerging from the Forum.

3. The programme for the 2017 Forum included two plenary sessions and more than 80 parallel sessions, the latter organized by the Working Group, OHCHR and external organizations on the basis of extensive consultations and some 130 submitted session proposals.

4. Under the theme of "Realizing access to effective remedy", participants in the Forum examined gaps and shortcomings in current efforts, and emerging good practices and innovations to ensure access to effective remedy. Multi-stakeholder discussions covered the full range of mechanisms envisaged under the third pillar of the Guiding Principles: State-based judicial mechanisms, State-based non-judicial grievance mechanisms, and non-State-based grievance mechanisms.

5. The Forum programme included a number of sessions dedicated to specific issues, trends and challenges in implementing all three pillars of the Guiding Principles. In addition to the dialogue held at the Forum, the Working Group facilitated a blog series to inform Forum discussions.[1]

6. The Forum was attended by more than 2,500 participants from 130 States, from a wide range of categories (see table below).

Category of participating stakeholders (%)	*Total*
Academic	14
Private sector (business enterprises, business/industry associations, consultancies, law firms, investors)	26
Civil society organizations, affected stakeholders, trade unions and indigenous peoples' groups	35
Multi-stakeholder initiatives	3
National human rights institutions	2
Member or Observer States	10
United Nations/intergovernmental organizations	7
Other	2

7. Participation has increased significantly since the first Forum in 2012, when around 1,000 people registered. Private sector representation has also witnessed steady growth. Some 55 per cent of registered participants were women.

[1] See http://blog.journals.cambridge.org/tag/wgbizhrs/.

II. Key messages from the opening plenary session

8. The Forum was opened by OHCHR and the Working Group. In their opening remarks, they underlined the fact that the growing interest in the Forum reflected the importance of the business and human rights agenda. They reiterated the importance of the theme of the 2017 Forum, noting that, while the first and second pillars of the Guiding Principles had received considerable attention since 2011, progress on pillar three — realizing access to remedy for victims of business-related human rights impacts — had been lagging.

9. Discussions were set in the broader context of the seventieth anniversary of the Universal Declaration of Human Rights, and the overarching vision of realizing dignity for all humanity. Standing up for human rights and making progress on realizing access to remedy for those adversely affected by business activity would make a real difference in advancing towards this vision.

10. The Working Group highlighted the progress made in stated commitments to translate the Guiding Principles into action: examples of national action plans and corporate policy commitments across regions; promising regulatory developments, such as the French "duty of vigilance" law; the recognition by Group of 20 (G-20) leaders of the importance of the Guiding Principles for sustainable supply chains; and the broad support from all stakeholder groups for the theme of "access to remedy" of the 2017 Forum, showing that dialogue on business and human rights had matured.

11. As part of its efforts to focus more attention on access to remedy, the Working Group had dedicated its latest report to the General Assembly to the issue of access to remedy (A/72/162). Its overall recommendation was that States should establish effective remedial mechanisms, both judicial and non-judicial, and address barriers in their access to those mechanisms; rights holders should be at the heart of the remedy process, and due attention paid to the diverse experiences of rights holders, including the central importance of adopting a gender lens; freedom of fear from victimization and attacks on human rights defenders should be addressed; and remediation efforts should be effective in both process and outcome.

12. The subsequent keynote plenary panel featured a group of prominent women leaders from different backgrounds. They addressed the topic of access to remedy further, and also an array of key issues confronting the global business and human rights agenda:

(a) The need for States and businesses to demonstrate stronger leadership. Examples of State leadership included recent efforts in Indonesia to protect human rights and to fight forced labour and trafficking in the fisheries sector, and regulatory developments, such as the Modern Slavery Act in the United Kingdom of Great Britain and Northern Ireland, and the "duty of vigilance" law in France, which had contributed to greater corporate attention to the expectation that companies exercise human rights due diligence. At the same time, regulations are only as good as their implementation. Examples of corporate leadership included steps taken towards greater transparency in supply chains, including by taking advantage of technological solutions to gather more intelligence about risks and impacts, adopting business models that embed respect for human rights in policies and procedures, and collaborating with civil society organizations to strengthen both preventive measures and accountability;

(b) The connection between corporate respect for human rights and inequality. Growing inequality is at the origin of human rights violations and abuse, and the erosion of democracy; improving conditions for workers at the bottom of the supply chain, with special attention to the situation of women, temporary workers and migrants, is critical;

(c) Responsible tax practice. One key concern is that corporate "tax dodging" had a negative impact on the ability of Governments to realize economic and social rights (including the funding of schools and health services), with a disproportionate negative effect on the poorest and most vulnerable in society. Companies should align behind responsible tax practices as a critical component of efforts contributing to the achievement of sustainable development for all;

(d) The increase in attacks on those who speak up against corporate impact on human rights and shrinking civic space. As an increasing number of States were introducing restrictions on civic space, in 2016 the number of attacks against and killings of human rights defenders speaking up against business-related impacts continued to rise. Two opposing trends were highlighted: on the one hand, there were more examples of positive engagement by business to stand up for civic freedoms or in defence of individuals; on the other, collusion between abusive government actors and business interests remained a major challenge. There was also often a lack of coherence between corporate commitments on social issues and their lobbying efforts, which may undermine human rights protection. With regard to Governments, it was recommended that they include protection of human rights and environmental defenders in their national action plans on business and human rights, and take concrete steps to address the problem of criminalization and other forms of retaliation targeting defenders. Business actors should on their side not use criminal and defamation laws and avoid strategic lawsuits against public participation ("SLAPPs") to silence people who raise concerns about adverse effects of business activities. A human rights defender speaking in the panel gave a simple yet powerful piece of advice to business: listen to those who raise concerns about human rights risks and impacts. One of the best ways to understand the situation on the ground — and be in a position to address risks proactively — is to talk to civil society, workers and local community representatives, and to listen to critical voices;

(e) New approaches to empower communities and workers. Experience suggested that community-based human rights due diligence approaches enable communities to do their own human rights impact assessments, which helped to address power imbalances and to strengthen meaningful dialogue. This was also an important factor for the effective operation of local grievance mechanisms. Empowering women — both at the workplace and in the community — was identified as a key issue;

(f) Actions needed to make progress on access to remedy. It was noted that government leadership is essential, reinforced by a stronger push and pressure from the United Nations and civil society. The need to end the criminalization of worker representatives and human rights defenders was reiterated, and seen as a key factor in making progress in realizing access to remedy for victims. With regard to the role of business, when people are adversely affected by business operations, remediation should be based on meaningful engagement with the stakeholders affected and be in line with best international practice.

III. Realizing access to effective remedy

A. Exploring elements of effective remedy: perspectives of affected stakeholders

13. Participants in the Forum explored elements of effective remedy from the perspective of an affected stakeholder. Victims and their representatives from different regions shared experiences from the ground. Accounts were given by a wide range of stakeholders, including community representatives, migrant workers, indigenous peoples, human rights defenders and organizations working with children.

14. Discussions included case studies from Australia (with regard to Manus Island), Bangladesh, Brazil, Chile, Colombia, the Democratic Republic of the Congo, India, the Occupied Palestinian Territory and Zimbabwe, involving companies from Australia, Bangladesh, Belgium, Brazil, Canada, China, India, the Netherlands, the Republic of Korea and Switzerland. One general message was that the third pillar had generally been overlooked and that initiatives by States, businesses and civil society to address negative effects had fallen short, and effective oversight was lacking.

15. One overall observation made by the Working Group and other stakeholders was that, for remedy to be effective and meaningful for victims, both the process and the outcome should take the perspectives of victims into account. Another resounding message was that all companies should meet their responsibility to provide for or contribute

meaningfully to effective remedy, in accordance with the Guiding Principles, when they cause or contribute to human rights abuse.

16. The issue of power imbalances was a recurring theme. Lack of information and resources, and barriers caused by travelling distances and linguistic and cultural differences tended to limit the capacity of victims to engage in effective dialogue. The need for open dialogue between the parties and the independence of the process were highlighted as basic requirements for meaningful engagement with victims.

17. Against the background of power imbalances, one idea proposed by the Working Group and discussed at the Forum was a pro bono network of lawyers, aimed at facilitating greater access to legal support for victims.

B. National action plans and the third pillar

18. Participants in the Forum recalled Human Rights Council resolution 26/22, in which the Council encouraged all States to take steps to implement the Guiding Principles, including to develop national action plans on business and human rights or other frameworks, and to submit annual reports on the implementation of their commitments. Participants highlighted the recent progress made in this area, while a number of States — Belgium, Brazil, Chile, Colombia, Czechia, France, Germany, Greece, Italy, Japan, Mexico, the Netherlands, Norway, Poland, Slovenia, Spain, Switzerland and Thailand — provided an update on their national action plans and other relevant initiatives.[3] The Working Group was encouraged by the increase in the number of States that had either developed or committed to developing a national action plan, and also by the commitment made by the G-20 leaders in 2017 to work towards developing such plans.[4]

19. According to the Working Group, given the open-ended and evolving character of the process involved, national action plans had to be updated regularly. It highlighted also the need for an open and inclusive process involving all stakeholders (including victims and their representatives, labour unions and human rights defenders), and for national baseline assessments to ensure that national action plans were tailored to address the most pressing business-related human rights challenges in a given context.

20. The Working Group, business associations and civil society speakers pointed out that existing national action plans were limited in terms of action to improve access to remedy. Both existing and forthcoming plans therefore had to address substantial gaps and comprise more specific, measurable, achievable and time-bound actions and objectives, and effective follow-up systems.

C. Judicial remedy

21. Access to judicial remedies was the backbone of the third pillar of the Guiding Principles. A central question for Forum discussions was how to increase the effectiveness of domestic public law regimes, with guidance by OHCHR (see A/HRC/32/19 and Add.1) and the Working Group (see A/72/162) providing a central reference. Participants highlighted the fact that companies are rarely subject to law enforcement with regard to administrative liability or other sanctions, the result of a number of challenges, such as lack of enforcement and weak domestic public law regimes. Discussions on domestic public law regimes focused on how to ensure effective deterrence and effective remedy, and how States could approach legal liability, and also on a range of well-known barriers to access to justice, many of which are linked to broader challenges to the rule of law. Key points included the following:

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[3] See www.ohchr.org/EN/Issues/Business/Forum/Pages/2017Statements.aspx.

[4] Council of the European Union, G20 Leaders' Declaration: "Shaping an interconnected world", 8 July 2017.

(a) Although most States have legal systems capable of handling corporate wrongdoing, there are many different approaches to these issues, such as attribution of criminal liability; lack of enforcement is a major issue;

(b) Corporate complicity is a key concept for the attribution of liability; most States that recognize corporate liability also recognize corporate complicity;

(c) Legal regimes relevant to business respect for human rights are generally not framed in human rights terms, resulting in problems such as outcomes, where the only applicable sanctions (such as a fine) might not be commensurate with the severity of the abuse or the harm caused;

(d) Resources available to prosecutors are limited (often accompanied by a lack of political will) to pursue companies or company representatives involved in alleged human rights abuses, and resources are even more limited when the harm has been inflicted in other jurisdictions.

22. Participants in the Forum examined how to overcome challenges and increase accountability for cross-border corporate human rights crimes by examining the life cycle of a criminal prosecution. Discussions highlighted recent work and initiatives to address existing accountability gaps, in particular:

(a) The Corporate Crimes Principles,[5] which build on the experiences of legal practitioners and prosecutors in combating corporate crimes actively;

(b) The study of the Working Group on best practices of cross-border cooperation between law enforcement agencies on business-related human rights cases (A/HRC/35/33), which confirmed that there was not a lot of practice in prosecuting such cases. The Working Group found, however, that in areas such as environmental protection, anti-corruption and anti-trafficking, there was good practice on which to build. In addition to formal mechanisms, it highlighted the importance of informal networks and cooperation, such as joint investigation teams. With political will, such practices could be replicated for business-related human rights cases.

23. Participants highlighted the key role of civil society organizations, including with reference to the recognition by the International Criminal Court that civil society plays an important part in collecting evidence, and the role of investigative journalism in exposing offshore tax avoidance schemes, money laundering and bribes (such as the investigations on the Panama Papers and the Paradise Papers by the International Consortium of Investigative Journalists). At the same time, both non-governmental organizations and prosecutors cautioned that evidence collected by the organizations had to follow the principle of due process and principles of justice; otherwise, prosecutors may not be able to rely on them.

24. The safety and protection of whistle-blowers and civil society representatives was another main concern, as underlined by the recent deaths of investigative journalists, representatives of non-governmental organizations, United Nations field workers and human rights defenders. Prosecutors participating in the discussions stressed that collaboration with whistle-blowers and civil society actors had to be based on the protection of anonymity and safety. From the perspective of judges, it was noted that, often, the problem that courts face is not the lack of evidence, but rather the lack of the conceptual framework in which the evidence is considered, particularly the challenge of piercing the corporate veil. In this regard, participants noted that the concept of "corporate identity" had been introduced to promote risk-taking and economic development, not to act as a shield from accountability or liability. Judges therefore have to have the courage to apply responsibility right up to the head organization. With regard to existing legal and practice limitations in the application of extraterritorial jurisdiction by the judiciary, public opinion could bring about rapid change, as witnessed in the areas of anti-bribery/anti-corruption and anti-trafficking.

[5] See www.commercecrimehumanrights.org.

25. During the discussions held on an international legally binding instrument, participants referred to the draft "elements" issued in 2017 to serve as a basis for negotiations among States. The substantive points suggested for a treaty to bridge existing gaps included:

- Civil liability in home countries of transnational corporations
- Barriers to justice related to the *forum non conveniens* legal doctrine
- Reversing the burden of proof in favour of victims
- Legal requirements for companies to exercise human rights due diligence in accordance with the Guiding Principles
- Barriers to class actions
- Uneven compensation standards (and consequently potentially skewed incentives for transnational corporations) across regions
- Legal assistance to victims

26. A range of different views on whether an international instrument would be the best way forward in closing the current accountability and remedy gaps was represented.

27. With regard to legal developments relating to access to remedy in cases involving transnational corporations, Forum participants highlighted developments in some jurisdictions, such as in English law regarding parent company liability, where this principle had been invoked in a handful of cases in order to frame access to remedy. Claims had been brought against parent companies domiciled in the United Kingdom of Great Britain and Northern Ireland, where jurisdiction depended on whether duty of care of a parent company in relation to actions of a subsidiary could be imposed. One question discussed was whether corporate reporting on human rights risks could increase exposure to the risk of litigation or actually demonstrate that due diligence had been exercised.

28. Another example centred on laws in North America, which could provide — though not in a straightforward manner — avenues for remedy, all of which predated the Guiding Principles. In the United States of America, in addition to the Alien Tort Statute, the extraterritorial reach of which was limited by the Supreme Court in 2013 (in *Kiobel v. Royal Dutch Petroleum*), other avenues included the Trafficking Victims Protection Reauthorization Act (civil and criminal liability in trafficking and forced labour) and the Global Magnitsky Act (sanctions against human rights abusers in other countries). In Canada, a number of cases had been brought against Canadian mining companies relating to human rights abuses committed in third countries, some of which were moving to trial as tort cases. Historically, such cases were rejected on grounds of *forum non conveniens*, but the judicial interpretation was changing.

29. It was suggested that regulations such as the Modern Slavery Act in the United Kingdom, the draft anti-slavery act in Australia and the non-financial reporting directive of the European Union did not by themselves improve access to remedy, as this was not their purpose. They did, however, play an important preventive role by promoting more effective risk management through human rights due diligence.

D. Strengthening State-based non-judicial remedy

30. Participants discussed the policy implications of findings made in a discussion paper prepared in the context of the OHCHR Accountability and Remedy Project II,[6] which focused on improving the effectiveness of State-based non-judicial mechanisms.

31. It was generally agreed that State-based non-judicial mechanisms provided specific benefits, such as a reduction in certain financial barriers prevalent in legal proceedings, and greater accessibility and faster resolution. It was also suggested, however, that despite these

[6] See www.ohchr.org/EN/Issues/Business/Pages/ARP_II.aspx.

advantages, positive examples were actually scarce, and that these mechanisms could lead to ineffective results owing to the lack of sanctioning power. It was noted that:

(a) The most successful State-based non-judicial mechanisms tended to be those that were highly specialized; this could lead, however, to a fragmentation of remedies in complex cases;

(b) Only a fraction of non-judicial mechanisms had extraterritorial reach, and had a weak level of enforceability;

(c) Most State-based non-judicial mechanisms also had a mandate focusing on the prevention of adverse effects, which might make them less effective as tools for accountability.

32. One observation made on recent trends was that several States had committed to review how State-based non-judicial grievance mechanisms work in relation to business-related human rights impacts in general, and to strengthen the national contact point system of the Organization for Economic Cooperation and Development (OECD) in particular.

33. In several sessions, participants addressed the national contact point system and its peer review process. It was a common understanding that, despite the need for further action, national contact points are potentially an important avenue for access to remedy in many situations (that is, when there is a link to countries adhering to the OECD Guidelines for Multinational Enterprises). One of the challenges highlighted was the lack of awareness about national contact points among affected stakeholders (communities, non-governmental organizations, workers and unions) and business. It was suggested that the contact points could complement judicial mechanisms by providing advantages, such as greater accessibility, faster processes and lower costs; a dialogue-oriented system, fostering mediation if the parties agree; and quasi jurisprudence, at least in some countries (such as France).

34. One case study where the outcome had been deemed successful by stakeholders featured during Forum discussions. It had been filed in 2015 with the national contact point in the Netherlands by 168 factory workers previously employed by the Congolese subsidiary of the Heineken company, Bralima, for violations of labour rights during the civil war in eastern Democratic Republic of the Congo, from 1999 to 2002. Success factors included:

- No statute of limitations
- Acknowledgement that remedy was the reason behind the national contact point system
- Clear incentives for companies to participate constructively
- Accessibility maximized by conducting local fact-finding and mediation, translating documents, and covering complainants' travel costs
- In the Netherlands, national contact point operated transparently and did not apply overly strict confidentiality restrictions; media attention also helped the case

35. In discussions on the ongoing peer review process of national contact points, all stakeholders — the national contact point under review, peer reviewers, civil society organizations, trade unions and business organizations — highlighted the advantages of the process. The process offered an opportunity for raising awareness and deepening understanding of the functioning of national contact points, and for sharing learning and improving accountability. The peer review process concerning the national contact point in Belgium was identified by non-governmental organizations as a good example of transparency on how recommendations were being addressed. Challenges nonetheless remained, such as in the assessment of its impact, and the lack of clarity with regard to how external inputs are considered in the review process. Non-governmental organizations found that the results in terms of facilitating access to remedy had not been taken properly into consideration.

36. National human rights institutions were another important group of actors in the area of State-based non-judicial remedy and business and human rights. With more than 40

national institutions from all regions attending and two dedicated sessions on their role, the Forum was able to shed light on their contribution to access to remedy, in particular through their own complaint-handling, mediation and investigative functions.

37. One key recommendation for improving the effectiveness of national human rights institutions, and for improving broader coherence in this area, was the call for closer collaboration among stakeholders to enhance positive results, greater capacity-building efforts (including through closer engagement with the OECD system), and more peer-to-peer reviews to share experiences. Another recommendation was the need to equip national institutions with a mandate to receive or investigate business-related human rights complaints, and to ensure their independence and that they are allocated sufficient resources.

E. Making operational-level grievance mechanisms work

38. Forum discussions on how to make operational-level grievance mechanisms work in practice were grounded in the effectiveness criteria for non-judicial mechanisms, set out in Principle 31 of the Guiding Principles. An overall point was that such mechanisms had to be part of a larger "ecosystem" of preventative and remedial mechanisms, including company frameworks. A key challenge that was repeatedly raised was the asymmetries of power in situations characterized by lack of or weak governance.

39. Attention was drawn to a review of international and national surveys by the International Commission of Jurists showing that only a small percentage of companies had some kind of operational grievance mechanism. The amount of guidance from industry level in certain sectors was, however, increasing. The Commission was currently exploring how to improve the effectiveness of operational-level mechanisms against the criteria set out in the Guiding Principles, with a focus on what the scope of such mechanisms can and should be, and on ways to address asymmetries in power, and interfacing with other types of grievance mechanisms.

40. With regard to successful worker-oriented approaches, the Fair Food Program initiated by the Coalition of Immokalee Workers, representing agricultural workers in the United States of America, was highlighted.[7] According to the experience gained under the initiative, to be effective, complaint resolution systems should be worker-initiated, based on the protection of workers, accessible, trusted, competent and timely.

41. Companies and industry associations in different sectors (including agriculture, apparel, consumer goods, electronics, mining, and oil and gas) that had set up or piloted operational-level grievance mechanisms found that:

(a) Mechanisms should be part of a human rights due diligence approach, providing useful early warning, which helped companies to assess risks to people;

(b) Tracking effectiveness and monitoring processes is critical;

(c) Technology solutions can help to improve access to remedy for grievances in supply chains;

(d) Brands should play a role in creating trust and transparency with suppliers, to help them to understand why a grievance mechanism is important;

(e) Exercising effective leverage in support of better access to remedy, including the use of contracts, should be further explored;

(f) Operational-level mechanisms cannot and should not deal with criminal investigations, although companies should support and collaborate with the relevant judicial mechanism, including by facilitating the gathering of evidence;

(g) With regard to worker engagement, third-party grievance mechanisms can be a relief valve if trust is low or absent, although social dialogue is preferable;

[7] See www.fairfoodprogram.org.

(h) There is no "one-size-fits-all" solution, and mechanisms oriented to local communities should take their perspectives into account; what works at the operational level in a formal, organized environment does not necessarily work in a supply chain;

(i) The legitimacy of a mechanism is directly related to how it was designed and who is involved. Government engagement is important to ensure connection with local governance and an interface with other grievance mechanisms. Engagement with local industry associations is also important.

42. Further points relating to the role of Governments were drawn from the example of the approach taken by Canada to mining companies operating abroad. One important aspect was the issue of leverage. A lesson from the Canadian context was that the Government may recommend sanctions if a company fails to engage when human rights complaints arise. This can include the withdrawal of economic support and trade advocacy support, which may be a significant factor for keeping companies at the table.

43. Participants also addressed the role of trade unions and access to remedy for women in supply chains. Key points included the following:

(a) As underlined in the Guiding Principles, operational-level grievance mechanisms should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes;

(b) Where trade unions are present, worker empowerment is heightened and social dialogue more effective;

(c) In certain sectors (such as fisheries and shipping), workers have extremely limited access to grievance mechanisms;

(d) As demonstrated by a case study of the horticulture sectors in Kenya and Uganda, the introduction of collective bargaining, new grievance mechanisms and women's committees helps to reduce the incidence of sexual harassment. Lessons learned from this context showed that the introduction of a company policy of zero-tolerance for sexual harassment and soft skill training to empower women workers contributed further to lower incidences of sexual harassment.

F. Policy coherence

44. Policy coherence at various levels is a recurring theme in Forum discussions. At the Forum in 2017, the issue was addressed both at the global governance level and in relation to State-level implementation, with a focus on the third pillar.

1. Access to remedy in global governance frameworks: recent developments and innovations

45. Discussions on supporting access to remedy in accordance with the Guiding Principles in global governance frameworks focused on, inter alia, developments in the OECD system, in the light of the incorporation of key components of the Guiding Principles into the OECD Guidelines for Multinational Enterprises. The performance of OECD national contact points was a key issue. Participants noted that 50 per cent of complaints handled by the contact points related to human rights. The challenges faced included the fact that two adhering States did not yet have a national contact point, while the contact points in 10 other States did not function. On the positive side, OECD ministers had made a commitment to improve contact points, all of which were expected to be up and running by 2021. This commitment had also been expressed in recent declarations of the Group of Seven and the Group of 20.

46. Civil society representatives highlighted the fact that remedy remained rare, even though it was the main reason for establishing national contact points. According to a review conducted by non-governmental organizations, remedy is available in only about 15 per cent of cases. A key recommendation was for national contact points to take into account the asymmetry of power between transnational corporations and affected stakeholders.

47. In their discussions, participants highlighted the revision completed by the International Labour Organization (ILO) in 2017 of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, to align it with the Sustainable Development Goals and the three pillars of the Guiding Principles. With regard to the third pillar, one key issue was the obligation of Governments to ensure that workers have access to remedy for human rights abuses involving transnational corporations. The role of trade unions in human rights due diligence processes was highlighted, as was the need for access to remedy to be tackled systematically, not only in a voluntary way.

48. A recurring topic at the Forum is the functioning of independent accountability mechanisms of international financial institutions. A critical point made at the Forum in 2017 was the importance of the independence of such mechanisms to allow them to address effectively any grievances raised by communities affected by projects funded by international financial institutions. Transparency, trust-building and awareness-raising with regard to accountability mechanisms and capacity-building to empower communities in their access to them were considered key success factors. One remaining challenge was the lack of coherence between international financial institutions and associated accountability mechanisms, which are often more in tune with realities on the ground.

2. Implications of the international investment regime

49. More than 3,000 international investment agreements regulated foreign direct investments, including provisions for arbitration or dispute settlement between Governments and private investors. While the international investment regime offers protection for investors, however, access to remedy for affected stakeholders is elusive. During discussions, Forum participants highlighted areas in need of reform, aimed at, for example, safeguarding the right to regulate, reforming investment dispute settlement and ensuring responsible investment. The need for a better understanding of the impact that investment agreements have on human rights was noted.

3. The "State-business nexus" and access to the remedy pillar

50. Participants in the Forum addressed the role of the State as an economic actor, and the integration of human rights in the management of export processing zones and export credit agencies.

51. Export processing zones are essentially State-owned enterprises with their own legal infrastructure. In a study on 120 export processing zones, the United Nations Conference on Trade and Development had found that, in such zones, "red tape" was typically eliminated and, in some cases, labour inspections and the implementation of environmental standards were more effective. This showed that the integration of standards to manage risks to workers and communities was possible in export processing zones, even though huge differences existed.

52. Some export credit agencies had begun to integrate the Guiding Principles into their due diligence processes, such as those in the Netherlands and Norway. Experience had shown that the integration of the Guiding Principles could improve the focus on disclosure and effective stakeholder engagement in projects supported by export credit agencies. One issue that still required more attention, however, concerned financial institutions beyond export credit agencies: how to effectively exercise leverage to support access to remedy when the financial institution is linked to — but not causing or contributing to — human rights harm.

G. Strengthening the third pillar in multi-stakeholder initiatives and platforms

53. Multi-stakeholder initiatives are generally perceived to hold a lot of potential for improving the protection of human rights in business activities and supply chains, even though there is also broad agreement that most of them have not met their potential, in particular when addressing the third pillar of the Guiding Principles. Participants noted that few multi-stakeholder initiatives had grievance systems in place (one figure suggested that

only 40 per cent did), and that international human rights standards in general were not systematically integrated. Examples of multi-stakeholder initiatives currently grappling with how to improve access to remedy included the Fair Labor Association, the Fair Wear Foundation, the Global Network Initiative, Guías Colombia (focusing on business and human rights in Colombia) and the International Code of Conduct for Private Security Service Providers' Association.

54. Participants in the Forum also examined the role of multi-stakeholder engagement and dialogue at the local level, and its role in strengthening access to remedy for affected stakeholders. One example was from the establishment of an independent problem-solving service for communities affected by mining operations in South Africa. In their discussions, participants indicated that independent mechanisms to resolve problems and grievance mechanisms could be hugely valuable in contexts where there [i.] a significant trust deficit between companies and communities. Company-led grievance mechanisms were often underutilized or not designed with the needs of the community in mind. Legal mechanisms were often out of the reach of poor communities and may not be suited to smaller grievances. Independent mechanisms could play a complementary role in such contexts. Participants highlighted several critical success factors, including the levelling of unequal power dynamics; the need to focus on process as much as outcome; the use of facilitated dialogue; and the need for mechanisms to be truly independent and credible.

55. A case study of the Thilawa Special Economic Zone in Myanmar saw a range of stakeholders share their experiences of addressing grievances. The discussions held on multi-stakeholder engagement generally highlighted the role that the Forum on Business and Human Rights itself could play in this context. Participants noted that the Forum, focusing on different industrial sectors and country contexts, presented a unique opportunity for people from around the world to come together and learn from each other's work. As an example, important connections had been made between stakeholders in South Africa and the Coalition of Immokalee Workers based in the United States of America with regard to their experience with the Fair Food Program and the complaint resolution system. Meaningful dialogue between different parties in complex contexts was never easy, but was still possible when stakeholders were committed to addressing problems together.

56. Another issue concerned ensuring remedies for workers and their families in the aftermath of accidents in industrial supply chains. Collective action involving local and global business, unions and the Government was seen as critical for success. The Rana Plaza compensation agreement had united everybody (local and global stakeholders) in a single framework for delivering compensation, even though the practical challenges, not least with fundraising, were considerable. The lesson to be learned was that it would not have been possible if all actors had not been involved. At the same time, ad hoc solutions to provide compensation were complex; a better approach would be to have effective systems of social security in place; workers and non-governmental organizations stressed, however, that against a background of limited State capacity to enforce relevant laws in many jurisdictions, such ad hoc measures to compensate victims were necessary. Participants also stressed that all efforts should be based on relevant ILO standards, and that multi-stakeholder efforts should take into account the concerns of all workers, not only those in export-oriented enterprises.

57. The role of business and industry associations was also addressed. One key point was that no company alone can plug current remediation gaps, including those that exist across global supply chains. Joint industry action can support better human rights due diligence and capacity-building, and strengthen leverage with regard to competitors, suppliers and Governments. Joint action to enhance access of people to remedy for adverse impacts should be seen as a "pre-competitive" issue.

II. Innovations in dispute resolution and leverage of third parties

58. The Forum agenda included discussions on innovative and collaborative approaches, and the role of third parties in a position to shape corporate practice. One discussion focused on gaps in access to remedy that could be addressed through "Hague style"

innovations involving a smart collaborative mix of various approaches to dialogue, mediation and arbitration. This included the creation of an access to remedy fund aimed at strengthening the institutions and processes for ensuring access to justice for victims of human rights abuse in which business enterprises played a role. The aim would be to solicit funds from private entities and individuals to support specific projects designed to remove institutional barriers to remedy and to strengthen dispute resolution processes. Another proposal was the creation of a business and human rights arbitration panel available either to victims of human rights violations who wish to bring claims against businesses, or to resolve disputes involving human rights-related claims between commercial parties (for example, where a supplier fails to comply with certain contractually imposed human rights obligations).

59. Another discussion centred on the role of effective mediation in more effectively addressing community grievances with regard to business-related human rights impacts, and consequently contributing to sustainable development for the community. The main lessons learned described by independent accountability mechanisms, non-governmental organizations and business enterprises included the need for capacity-building on all sides; the need for joint fact-finding or external expertise trusted by both sides; clear ground rules accepted by both sides; the identification of legitimate representatives of victims; the proactive inclusion of women from affected communities (if they are not included at the table); recognition by business enterprises that conflict is not in their interest, and that their relationship with a community should be seen through a long-term lens; and the effectiveness of operational-level grievance mechanisms in addressing grievances early and before they escalate.

60. In another discussion, participants focused on the role of corporate counsel and law firms, which among other things addressed the role of the "wise counsellor" and the question of pro bono legal support to victims. With regard to the former issue, participants emphasized the importance of the Practical Guide on Business and Human Rights for Business Lawyers of the International Bar Association.[8] They noted that corporate lawyers could and should play a proactive role in advising their corporate clients on human rights due diligence, which ultimately would be beneficial to corporate governance and lead to better supply chain and risk management. Bad human rights due diligence and failure to take a role in addressing legitimate calls for remedy would eventually come back to haunt a company. The role of a wise legal counsellor would be to put information on human rights abuse and risks in context. With regard to the importance of strengthening pro bono legal support to communities, participants noted that there was a great need to address current inequality of legal arms between communities and transnational corporations. There was also a need for lawyers who are both independent and competent in business and human rights-type litigation. Such legal support was scarce, and communities might not have the resources to engage competent lawyers where they can be found. Forum participants welcomed an idea proposed by the Working Group of exploring a pro bono network, but also highlighted a range of practical challenges. One critical point was the need to build capacity at the local level and to tap into local legal expertise. There was also a need to map and broaden existing networks of pro bono legal support provided by, for example, existing human rights clinics, and to facilitate knowledge-sharing.

IV. Action on all three pillars

A. State action

61. The Working Group and other stakeholders acknowledged that legal developments in several jurisdictions had the potential to create positive change. It was also noted — as stressed in the Guiding Principles — that States should not assume that businesses invariably prefer or benefit from State inaction, and that they should consider a smart

[8] Available from www.ibanet.org/LPRU/Business-and-Human-Rights-Documents.aspx.

combination of measures, including effective regulation. Several recent regulatory and policy developments by States beyond national action plans were highlighted:

- Laws with broad human rights due diligence provisions for companies of a certain size (the "duty of vigilance" law in France)
- Laws geared towards improving transparency with regard to how companies address specific human rights risks (Modern Slavery Act in the United Kingdom, and forthcoming modern slavery act in Australia; forthcoming due diligence requirements with regard to child labour in the Netherlands)
- Policies aimed at addressing the impact on human rights in specific sectors (ministerial directive on expected conduct of business enterprises in the fisheries sector with regard to human rights and fighting forced labour and trafficking in Indonesia)
- Policies to strengthen corporate reporting on social risks and human rights due diligence in supply chains and foreign direct investments through industry initiatives (China)
- Facilitating multi-stakeholder sector-based platforms for identifying and addressing human rights risks (sector agreements in the Netherlands; sector dialogues in Germany) or issue-specific multi-stakeholder processes (such as human trafficking and the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, co-chaired by Australia and Indonesia)
- Warnings of introduction of mandatory human rights due diligence if companies fail to take necessary action voluntarily (Germany)

B. Corporate respect for human rights in practice

62. Discussions held during the Forum touched on different aspects of how companies were implementing the second pillar of the Guiding Principles (the corporate responsibility to respect) and what was needed to bring about faster change. Participants concluded that:

(a) Effective change is about addressing problems faced, learning from them and improving for the future;

(b) Business and human rights is an issue that should not be confined to the sustainability or compliance department, but addressed throughout the organization to ensure coherence between all business operations;

(c) There is a need for internal training to sensitize the organization;

(d) Suppliers should be closely monitored to ensure that they comply with their commitments to codes of conduct; mutual, ongoing engagement with suppliers is one possible way for their successful implementation;

(e) Leadership and company culture are essential in initiating and executing respect for human rights;

(f) It is a continuous journey of learning, where the connection between business and human rights needs to be "demystified" and explained in a way that everyone in the business and value chain can understand.

63. Time was allocated in discussions to reflect on progress made in recent years and to explore emerging trends and developments. Speakers from different backgrounds recognized that some progress had been made in, inter alia, regulatory frameworks (particularly with regard to the issue of modern slavery and to transparency). Major challenges nonetheless remained in the implementation of the Guiding Principles:

(a) There is still little concrete commitment from businesses to respect human rights beyond a relatively small group of global corporations;

(b) Even companies that have adopted policy commitments in line with the Guiding Principles demonstrated gaps in operationalization at the local level;

(c) The complexity of monitoring large supply chains;

(d) Access to effective remedy is still a challenge for most companies;

(e) Human rights issues in the large informal economy that are not covered by the formal regulations are largely neglected.

64. In order to plug the gaps, participants drew attention to the need for:

- A combination of regulatory tools
- Both binding agreements and more flexible and pragmatic sources of governance
- Clear expectations and continuous scrutiny by Governments requiring all companies, regardless of their size, to implement the Guiding Principles
- Government guidance and support for small and medium-sized enterprises, including by means of peer and sectorial platforms
- Consumers and investors to call for systematic changes
- In the case of investors, frameworks that reward companies that address human rights risks, beyond simply having policies in place
- New technologies and partnerships to address the scope and scale of challenges
- States, as economic actors, to lead by example at a significant scale by integrating human rights in public procurement and State-owned enterprises (assuming that there is the political will to do so)

65. Participants noted that benchmarking and ranking initiatives, such as the Corporate Human Rights Benchmark,[9] were considered important forces for driving progress, even though all initiatives also found that companies scored particularly poorly with regard to remediation efforts. At the same time, participants noted that the engagement of capital markets to a much larger extent was needed; if Fortune 500 were placed on a human rights index, more people and investors would take notice and base their decisions on that information. Another challenge was how to measure actual impact and company performance, given that benchmarks tended only to show what companies say they are doing, not what they do in practice.

66. One key issue for corporate respect of human rights concerned exercising leverage in business relationships when they are linked to, but not causing or contributing to, human rights abuse. During one discussion, participants explicitly asked how transnational corporations could use leverage to advance access to remedy through business relationships. Reference was also made to the revised ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (see para. 47 above), which calls upon multinational enterprises to use their leverage to encourage their business partners to provide effective means of enabling remediation for abuses of internationally recognized human rights. Participants concluded that:

(a) Collaboration with others (including industry organizations and competitors) is the most important means for strengthening leverage;

(b) The financial services industry plays an important role: engagement can lead to better outcomes;

(c) Companies should "translate" from the language of lawyers to terms that are understood by more people across organizations;

(d) Leverage could be built up-front into contracts, dialogue and training with suppliers and joint venture partners;

(e) Investments should be made in social dialogue and local solutions.

67. During a special session, attention was drawn to experiences of human rights due diligence in investment and supply chains in China, and lessons were shared on

[9] See www.corporatebenchmark.org.

management practices both prior to investments (comprehensive due diligence and feasibility management, which encompasses social and environmental factors) and during investment (establishing and improving due diligence mechanisms on the basis of economic, social and environmental risk assessments).

68. Key initiatives conducted in 2016 and 2017 in which the Guiding Principles were either referenced or used directly as a framework included:

- A social responsibility management system in the information and communications technology industry
- The green aviation initiative and networks
- The Responsible Cobalt Initiative
- The Guidance for Sustainable Natural Rubber[10]
- The revised China Social Compliance 9000 for the textile and apparel industry

69. Another notable initiative that held important lessons for stakeholders with regard to corporate human rights due diligence was the banking agreement reached in the Netherlands on international responsible business conduct. This multi-stakeholder initiative between the banking associations, the Government of the Netherlands, three civil society organizations and two trade unions included a number of working groups set up to look after specific aspects of implementation, one of which gave insights to Forum participants on the issue of enabling remediation. The discussions were relevant beyond the banking sector, in particular because they sought to clarify the terms in the Guiding Principles of "cause", "contribute to" and "directly linked to" and their implications for the responsibility to provide remedy. Participants noted that there was a common tendency to fixate on "cause and contribution situations" in which the Guiding Principles clarified that business enterprises had a responsibility to provide, or contribute directly to, remedy. Less time was allocated to worrying about what to do in a "linkage situation", given that, under the Guiding Principles, businesses do not necessarily have a responsibility to provide remedy, even though they may choose to do so. It was stressed that this gap missed the fundamental point in the second pillar of the Guiding Principles, namely, that remedy, and a business's role in relation to it, is always relevant. A good practice would be considering how to exercise leverage to ensure accountability for any harm caused and how it could be addressed. This would also be an effective way to prevent future harm. Another insight emerging from this discussion was that, although approaches to grievance mechanisms might vary across sectors, even enterprises that often find that their link to human rights risks is primarily through business relationships (as characteristic for many actors in the banking sector) ought to think about such mechanisms. A message that held relevance beyond the banking sector was the need to go beyond simply asking "do you have a grievance mechanism?". More thoughtful and effective approaches were needed.

C. Human rights defenders, civic freedoms and the role of business

70. Trends with regard to persons who speak up against business-related human rights impacts worldwide and the need to ensure better protection of human rights defenders have become a standing item on the agenda of the Forum. Discussions on human rights defenders have also helped feed into the ongoing efforts of the Working Group to develop guidance on this issue.[11] In 2017, participants in the Forum reiterated that human rights defenders were instrumental in identifying actual and potential business-related human rights impacts — which is also a first step towards securing effective remedy. By doing so, defenders also provided access to information about risks and impacts, enabling better corporate human rights due diligence.

[10] See www.ccmc.org.cn/docs/2017-11/20171107204714430892.pdf.

[11] See OHCHR, "Human rights defenders and civic space — the business and human rights dimension", available from www.ohchr.org/EN/Issues/Business/Pages/HRDefendersCivicSpace.aspx.

71. The main session on human rights defenders was opened with one minute of silence to honour all defenders killed in the course of their work. Participants received an update on the work of the Business and Human Rights Resource Centre in tracking cases involving attacks on human rights defenders working on business and human rights issues, which showed that more than 800 attacks had been registered since 2015. Land-intensive industries, such as mining, agriculture and renewables, had witnessed the largest numbers of incidents. Businesses were implicated in different ways, such as in cases of legal harassment involving strategic lawsuits against public participation, or failure to address attacks carried out by government actors and security forces. In other examples, businesses could use their lobbying power to encourage a Government to introduce restrictions on advocacy, or to retaliate against people who raise concerns. Protection and accountability gaps were especially acute in countries where rule of law was weak, but also existed in jurisdictions where courts could be effective. Participants noted that retaliation against defenders had a chilling effect, and restricted the ability of defenders to raise early warnings about business-related impacts. Defenders ended up having to spend their time and limited resources defending themselves and their institutions. Participants pointed out that criminalization of defenders in itself should be a crime, and that prevention of attacks was critical.

72. On a positive note, a growing number of companies and business leaders recognized that protecting, respecting and supporting human rights defenders and civic freedoms in a business context were both a responsibility and ultimately good for society and business itself. Examples of positive actions by companies presented at the Forum included:

- Apparel companies defending union rights
- Companies standing up for lesbian, gay, bi, trans and intersex (LGBTI) persons, including companies joining the recent OHCHR standards of conduct for business in tackling discrimination against LGBTI persons[12]
- Companies addressing xenophobia and anti-migrant narratives

73. Participants in the Forum also heard about efforts of some Governments to more actively prevent and to address risks to human rights defenders in third countries where "their" transnational corporations operate, as in the case of the "Voices at risk" policy in Canada.

74. Key recommendations included the need to ensure that protection of and respect for rights human rights defenders were integrated in national action plans and human rights due diligence processes. Going forward, it was crucial to strengthen the role of human rights defenders in the pursuit of sustainable development and as "justice enablers" in bringing about access to remedy for victims of corporate-related human rights abuse.

D. Corporate respect for human rights and the Sustainable Development Goals

75. One objective of the Forum was to contribute to a greater understanding of the connection between business and human rights and sustainable development. A major backdrop was provided by the embedding of human rights in the Sustainable Development Goals, and the significant role that the private sector envisaged to play in realizing them. While the role of the private sector is crucial, there is a risk of a return to traditional and partial philanthropic approaches by businesses that fail to take into consideration the social and environmental impact of a company's core operations and value chain. Forum speakers stressed that the greatest contribution that most companies could make to socially sustainable development (its "people part") was to embed respect for human rights in all their activities and value chains. The key references included the recommendations addressed by the Working Group to States and businesses on integrating the Guiding

[12] See www.unfe.org/standards.

Principles into the implementation of the Sustainable Development Goals,[13] and a joint statement by a group of civil society organizations along the same lines.[14]

76. Case studies presented to demonstrate the relationship included:

- Efforts by Nestlé, in collaboration with the non-governmental organization Verité, to address forced labour and human rights abuses in the seafood supply chain, showing also the direct contribution to Sustainable Development Goal targets (for example, targets 8.7 and 8.8)
- The multi-stakeholder initiative "Malawi Tea 2020" to ensure a living wage for farm workers, involving companies in the Ethical Tea Partnership, Oxfam and Malawian unions and civil society organizations
- Efforts by Chile to integrate human rights requirements in public procurement processes and the integration of the Sustainable Development Goals in the national action plan on business and human rights

77. The overall takeaways from the discussions included:

- Company-non-governmental organization partnerships to support the Sustainable Development Goals should be founded on transparency and a corporate commitment to respect human rights
- Corporate reporting on contributions made to the Sustainable Development Goals should include information on how risks to persons are addressed
- The Sustainable Development Goals provided a framework for longer-term and more holistic perspective for investors, even though it should also integrate human rights risks and impacts (that is, the "people part")

E. Gender lens

78. Participants in Forum sessions highlighted the fact that women faced unique business-related human rights abuses and subsequent barriers to remedy. The sessions focusing on gender also provided important input to the Working Group and its efforts to develop guidance for integrating a gender lens into the implementation of the Guiding Principles.[15] That women not be considered a homogeneous group was continuously stressed, given that remedies and issues should be addressed taking into account their own specific context. The Working Group and stakeholders called for proactive measures to be taken by both Governments and businesses in order to avoid gender-blind practices, at the risk of reinforcing patriarchal and discriminatory structures if they failed to do so.

79. One issue discussed concerned land-intensive investments and their impact on women, such as:

- The exclusion of women from negotiations and ownership of land
- Unpaid care and domestic work, compounded by displacement and environmental damage
- Changing gender relations in communities owing to the influx of migrant workers or increasing domestic violence

80. Key solutions included the need for companies to involve affected women in the design and evaluation of mitigation and remediation processes, to address the barriers that

[13] OHCHR, "The business and human rights dimension of sustainable development: Embedding 'Protect, Respect and Remedy' in SDGs implementation", information note, 30 June 2017 (available at www.ohchr.org/Documents/Issues/Business/Session18/InfoNoteWGBHR_SDGRecommendations.pdf).

[14] See https://business-humanrights.org/sites/default/files/documents/SDGs-businesshumanrights-openletterSept2017.pdf.

[15] See OHCHR, "Gender lens to the UNGPs" (available at www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx).

women faced when speaking up and submitting complaints, and to give them access to adequate and transformative remedies.

V. Closing plenary and general recommendations

81. **The overall message in the speeches made by speakers during the closing plenary was the recognition that many business enterprises had made progress in implementing the Guiding Principles, even though wider and more comprehensive action by businesses and Governments was urgent.**

82. **Participants in the closing session heard commitments from the Government of Malaysia to develop a national action plan on business and human rights in 2018, and from the CEO of the bank BNP Paribas to withdraw financing of oil and gas extracted from tar sands and of tobacco production because of human rights considerations based on its commitment to the Guiding Principles and other international standards. The United Nations Global Compact reiterated its commitment to prioritize the promotion of human rights in its engagement with the business sector through enhanced learning platforms on how business could meet its responsibility to respect and by promoting the implementation of the Guiding Principles in business activities and value chains.**

83. **Key messages from stakeholders on the way forward included the call made by the indigenous peoples' caucus upon States to ensure rapid progress in realizing the three pillars of protect, respect and remedy, and to integrate the protection of indigenous peoples in their national action plans; to take steps to address the barriers to justice and remedy for business-related human rights impacts experienced by indigenous peoples across the world; and for businesses to step up action both to prevent impacts on indigenous peoples and to meet their responsibility to remediation when indigenous peoples are harmed by business operations.**

84. **Global unions called for collective efforts to scale up awareness and action beyond policy level on the Guiding Principles. In order to achieve meaningful implementation of the Guiding Principles from the perspective of workers around the world, Governments and businesses should address modern slavery and ensure freedom of association, decent wages and safe workplaces. Global framework agreements involving unions were an effective tool that should be employed more widely. All businesses should undertake effective human rights due diligence, while States should take legal and administrative measures to ensure access to remedy for workers and create binding legal frameworks.**

85. **OECD called upon Governments to ensure more effective policy coherence between human rights obligations and business-oriented policies, and to improve access to non-judicial remedy by providing adequate resources to allow national contact points to be effective.**

86. **The United Nations High Commissioner for Human Rights emphasized the urgent need to stand up for human rights. He called upon all stakeholders, in particular States and businesses, to take strong action in combating discrimination, hate and violence, and encouraged civil society actors to continue to fight for the rights of people affected by human rights violations and abuse.**

87. **The Working Group attempted to summarize some of the key messages emerging from Forum discussions in a "2020 road map":**

(a) **Making a commitment to implementing the Guiding Principles is an initial critical step for States and companies to take. This in itself, however, is not sufficient. Concrete short- and long-term action must be taken to apply the "Protect, Respect and Remedy" framework to prevent and address human rights abuse;**

(b) **All States should develop national action plans by means of inclusive processes that involve both businesses and civil society and with a focus on the word "action"; in this regard, the Working Group also noted the need to improve existing**

national action plans during the review process, especially in the case of the third pillar;

(c) **When it comes to providing effective remedies to victims of business-related human rights abuses, the time for talking is over. Existing barriers impeding access to effective remedies are well known, and States must work together to take urgent steps to remove them;**

(d) **Sensitivity should be shown towards the diverse experiences of all rights holders. No one should be discriminated against or excluded on grounds such as race, colour, ethnicity, social origin, sex, sexual orientation, religion, language, disability or migration status;**

(e) **There must be a change in mindset, from a "race to the bottom" to "a race to the top" by injecting human rights into the DNA of businesses and of States' economic policy frameworks. This includes the area of "economic diplomacy" tools. States should lead from the front in creating a regulatory framework that ensures that all businesses prevent, mitigate and remedy the adverse impact of their global footprint on human rights;**

(f) **States should not see human rights as an avoidable "speed breaker" to economic development; rather, human rights should be treated as an essential precondition for sustainable development, in accordance with the pledges that States made when they adopted the Sustainable Development Goals;**

(g) **Threats to human rights and environmental sustainability relating to economic inequalities and climate change should be a matter of urgent concern for States and businesses alike. Transformative changes are needed to address these challenges;**

(h) **Tax evasion or avoidance by business enterprises is another issue that requires the collective attention of States. It should always be recalled that evading or avoiding the payment of taxes undermines a State's ability to mobilize resources to realize human rights;**

(i) **Discrimination and sexual violence against women must be addressed by both States and businesses as a matter of priority;**

(j) **Individuals and communities, including indigenous peoples, have a right to speak up when business operations affect them negatively. While the situation on the ground across the world is deteriorating for defenders, it is nevertheless a positive sign that more businesses are taking steps to respect defenders and to speak up when rights of defenders and civic freedoms are under threat (for example, in relation to LGBTI persons and in countering anti-migration narratives);**

(k) **Business associations should continue to build the capacity of their members in conducting meaningful human rights due diligence. They should also clearly communicate the expectation that any "private" corporate lobbying with Governments does not undermine their "public" commitment to the Guiding Principles;**

(l) **Lawyers too have a vital role in implementing the Guiding Principles: their professional advice to businesses should not cause or contribute to any adverse human rights impacts. Lawyers should also take a proactive role in helping affected individuals and communities to seek access to a full range of effective remedies. The creation of a global network of pro bono lawyers should be explored;**

(m) **Emerging good practice approaches for corporate human rights due diligence should be built upon and scaled up across all regions — the theme of the report of the Working Group to be submitted to the General Assembly at its seventy-third session. It will also be a major focus of the Forum on Business and Human Rights in 2018, to explore what has been working to date and how businesses, Governments and other stakeholders can plug gaps.**